



# Wrongs without Rights

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*Wrongs without Rights*

## ABSTRACT

How do rights relate to moral complaints? What is the relationship between our moral entitlements—the obligations that are owed to us—and the moral complaints that we can make—our claims to have been wronged?

It is a familiar and natural thought, especially in recent work on the relational character of morality, that these phenomena are opposite sides of the same coin: to have a right is to be in the position of potentially having a complaint, and to be wronged is to have had one's right violated. I argue that this view is incorrect. My thesis is that our *ex ante* normative relations—like rights and directed duties—do not map straightforwardly onto our *ex post* moral relations—like having a complaint and being wronged. Rights and complaints are both qualitatively and extensionally distinct.

To defend this claim, I develop six arguments. First, I argue that third parties may be wronged although they are not rightholders. Second, I argue that rights are action-guiding in a way that potential wrongings are not. Third, I argue that the character of a wrong, as shown by what it would take to compensate it, is not dictated entirely by the right that was violated. Fourth, I argue that parties sometimes have rights despite lacking the standing or capacity to complain. Fifth, I argue that we can wrong one another with our thoughts or attitudes, even though such purely mental activity may not be the subject of rights. Finally, I draw attention to the difference between granting permission and granting forgiveness, which suggests

that waiving a right and waiving a complaint are importantly distinct.

The picture that ultimately emerges from these discussions is roughly as follows: rights are action-guiding entitlements that one be treated in a particular way, whereas wrongs arise when an actor cannot justify an action to one who has standing to demand justification. This account aims to give a richer picture of morality's relational elements and also to shed light on the debate between interest theories and will theories of rights.

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FOR MY FATHER.

# Acknowledgments

INTELLECTUALLY, I WAS A STILL CHILD when I first entered the Harvard Philosophy Department as an 18-year-old college freshman. Emerson Hall has been my academic home in some capacity ever since. I owe it my philosophical identity.

This project began in Niko Kolodny's seminar during my first year of graduate school, which first introduced me to the puzzles of wronging and directed duties. I came away from that semester with the kernel of an idea, and I have been trying to cultivate it ever since.

Chris Korsgaard helped me turn this kernel into a real project. Her patience, encouragement, and insight made graduate school a time of discovery that I don't believe that I will ever match. Her genuine curiosity about these questions has made it feel like our project, a joint investigation.

I have had other excellent guides along the way. Tim Scanlon has offered more valuable assistance than I can catalogue. His thoughts on blame and on rights are ever present, but I am particularly grateful to him for steering me toward thinking about contract law. To the extent that my work resides at the intersection of moral and legal questions, it is because Tim helped me conceptualize the connection.

Frances Kamm has modeled the kind of concrete, bottom-up philosophy that I find compelling, and she has challenged me with inventive and insightful nuances at every turn. Many discussions with Doug Lavin have allowed me to appreciate the view that I am challenging. Much of this dissertation is written in the spirit of answering his questions. I have received important and helpful comments from John Goldberg, who entered the project late and was therefore able to help me see it as a whole. And, throughout the project, I have received informal comments and assistance from many others, including Ryan Doerfler, Charles Fried, Micha Glaeser, Jeff Johnson, Paul Schofield, Seana Shiffrin, Jiewuh Song, and everyone in the Moral and Political Workshop.

Finally, this dissertation exists because of my family. My father is in the commitment to seeing the world, through both concrete and imagined examples. My mother is in the core idea that humans have a moral stake in what happens to one another. Emily is in every sentence.



*Yes, she was bound to choose him. So it had to be, and I have nothing and no one to complain about. I am myself to blame. What right did I have to think she would want to join her life with mine?*

Levin in Leo Tolstoy, *Anna Karenina*

*I send you a gift, which if it answers ill the obligations I owe you, is at any rate the greatest which Niccolo Machiavelli has it in his power to offer. For in it I have expressed whatever I have learned, or have observed for myself during a long experience and constant study of human affairs. And since neither you nor any other can expect more at my hands, you cannot complain if I have not given you more.*

Niccolo Machiavelli, Preface to *Discourses of Livy*

# 1

## Introduction

THIS DISSERTATION CONCERNS THE RELATIONSHIP between rights and complaints. That is, it concerns the way in which our moral entitlements—the obligations of others that are owed to us—relate to the moral complaints that we can make—our claims to have been done an injustice, or to have been wronged. It is commonplace for us to slide back and forth seamlessly between these different ideas. Levin, for

example, infers naturally from the fact that he had no right to Kitty's affection to the conclusion that he can have no complaint when she rejects his suit (2004, p.84). Tolstoy's reader, however, may not be so convinced. As this suggests, we occasionally catch a glimpse of the concepts coming apart. For example, in a prefatory remark that this author would gladly join, Machiavelli notes that, although his work may not fulfill his duty to his reader, there can be no complaint against his efforts (2008, p.9).

My aim is to defend the view that rights and complaints are both qualitatively and extensionally distinct from one another. Qualitatively, I mean to show that rights and complaints serve different functions in our moral practice. Extensionally, I mean to show that the occasions when we can assert a complaint and the occasions when we have been deprived of an entitlement do not always coincide. In short, I will argue that rights and complaints are not simply flip sides of the same coin. If these moral relations are separable, it is significant both practically—because we often infer from one to the other—and theoretically—because their supposed connection is often thought to tell us about the sources of our moral obligations.

The question of how rights and complaints relate to each other arises because there are multiple ways in which individuals can relate to each other morally. When I am considering how to act, your moral status places constraints on the way that I may treat you. For example, I should not lie to you for my own gain. And I should not treat you as a convenient source of organs. Moreover, you have some control over the constraints on my action: you can permit my attempts at deception (as

when you agree to play poker), or you may decide to donate a kidney to me. We have an inchoate understanding that these constraints spring from your moral status, although it is hard to say exactly what this means. It seems like I ought not do these things *because of* the sort of being that you are. In this sense, we say that you are entitled to such treatment from me; it is owed to you.

But moral relations are hardly limited to the forward-looking ways that an individual's moral status places constraints on how we may act. Moral agents also relate to one another in different ways after one party injures another—as one who has wronged and as one who has been wronged. These after-the-fact relations are evidenced in our practices of moral complaint, criticism, resentment, compensation, apology, and forgiveness. For example, if I cause you harm by deceiving you, then you will have a complaint against me. Even more so if I steal your kidney. It will not merely be the case that I acted wrongly, but also that I wronged you. Here again morality involves a particular sort of relationship between one agent and another.

It is tempting to see all these relationships as unified. Having a right is often taken to provide the unifying concept. Rights, it is thought, place constraints on what we can do to each other. And what it is to have a right is, in part, that one will be wronged if certain actions are not performed or if certain interests are not protected. To be a rightholder is to be the one who potentially has a complaint if obligations aren't fulfilled. Having a right and being potentially wronged, then, are simply different perspectives on the same moral relation—much as the future and the past may simply be different perspectives on the same moment in time.

But I believe this view is mistaken. Wrongings are not merely the outline left

where rights have been taken away. And rights are more than the glimmer of future liability. Eliding the two relations such that they become reciprocals of each other fails to do justice to either one.

As I have said, it is often natural to transition between statements about rights and statements about wrongs.<sup>1</sup> In many circumstances, this transition is warranted. But people often claim something stronger—that there is a necessary association between these ideas. Here is a smattering of examples, ranging over thinkers with very different conceptions of rights:

- Michael Thompson: “You have, as we sometimes say, a duty to Sylvia not to kill her. You ‘owe’ it to her not to kill her. Such language is perhaps a bit stiff, but we can put the same point more colloquially. We can say, for example, that in killing Sylvia *you* wrong *her*: You would do wrong precisely ‘to’ her, or do wrong ‘by’ her.” (2004, p.34)
- Justice Benjamin Cardozo: “What the plaintiff must show is ‘a wrong’ to herself, i.e., a violation of her own right...the commission of a wrong im-

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<sup>1</sup> As a terminological point, I use the word “wrong” in its noun form—e.g., “he committed a wrong”—to mean an instance of wrongdoing. In this way, the use as a noun is associated with the use as a transitive verb—e.g., “he wronged her.” Thus, wrongs, in my usage, are directed against someone. This use should be contrasted with uses associated with the adjective “wrong”—the substantival use or use to imply simply an instance of doing something that is wrong—which would not necessarily imply injustice directed against someone. In other words, I distinguish “he did a wrong” from “he did wrong.” Not all writers agree with my choice. David Owens, for example, specifically distinguishes between “wrongs” and “wrongings.” He offers the following example: “If I concrete over the Grand Canyon, I have committed a wrong by disregarding its aesthetic value even if I have wronged nobody” (2012, p.45). Although Owens says that the assimilation of “wrongs” and “wrongings” is “a substantive normative claim,” I think that we are in basic agreement despite our linguistic disagreement. I agree with Owens’s substantive claim that there can be wrongful acts that do not involve wronging anyone. I simply resist calling such acts “wrongs” because, to my ear, “he committed a wrong” implies that there is someone who has been wronged. Owens’s terminological choice means that, for him, “he did a wrong” and “he did wrong” mean the same thing, whereas I think that we would ordinarily take them to have different meanings. Out of an overabundance of caution, I shall try to use the gerund “wronging” where there might be any possible confusion. But the reader should understand that I generally use the nouns “wrong” and “wronging” interchangeably.

ports the violation of a right ... Affront to personality is still the keynote of the wrong.”<sup>2</sup>

- Jeremy Bentham: “The distinction between rights and offences is therefore strictly verbal—there is no difference in the ideas. It is not possible to form the idea of a *right*, without forming the idea of an *offence*.” (1838, p.159)
- E. J. Bond: “It can now be stated bluntly that it can only be true that I have a moral obligation toward you ... if you have a moral right to demand something of me. ... (This is built into our very understanding of moral language, which means that it is true *a priori*.) If I do have a moral obligation toward you ... which means that you have a moral right to demand it of me, and I fail to honor that obligation ... then you have been *wronged*, you have a justified complaint against me, a complaint justified *on moral grounds*, and you may be morally entitled to seek redress or reparation, perhaps to punish me or to demand that I be punished (pay a penalty), perhaps to demand that I make amends, or both. ... The preceding ... showed ... the interconnectedness of certain ideas that exist in the common understanding. ... [I]f there is such a thing as injustice—and we know there is—then there are rights, for injustice consists in the violation of rights.” (1996, pp.196-200)
- Judith Jarvis Thomson: “I will use ‘Y wronged X’ and ‘Y did X a wrong’ only where Y violated a claim of X’s. So on my use of these locutions, they entail that Y acted wrongly; but they entail more than just Y acted wrongly—they entail that Y wrongly infringed a claim of X’s.” (1990, p.122)
- David Owens: “[W]hat is it to do wrong in a way that wrongs someone? If X would wrong you by deceiving you then you have a right against X that he not deceive you; X *owes* it to you not to deceive you, he has an obligation *to you* [to] be truthful to you. And owing *you* the truth is different from merely being obliged to be truthful.” (2012, p.46)
- G. E. M. Anscombe: “Justice as a personal virtue is that character in a man which means that he has a settled determination not to infringe anyone’s rights. A wrong is an infringement of a right. What is wrong about an act that is wrong may be just this, that it is *a wrong*.” (1990, p.152.)

This dissertation addresses this supposed unity. The subject of this dissertation

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<sup>2</sup> *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (1928).

is how the relational obligations that we owe to others relate to the ways that others can hold us accountable for our actions. Put another way, how do ex ante moral constraints relate to ex post moral complaints? Or yet another way, how do rights and duties relate to wrongs and injuries? As has already been suggested, I believe that the answer is not one of simple unity. My thesis is that our ex ante normative relations—like rights and directed duties—do not map straightforwardly onto our ex post moral relations—like having a complaint or being wronged. Rights and complaints are separable moral phenomena.

The separability of these relations holds significance both for first-order, practical questions about what to do in particular cases and for deeper, metaethical questions about the nature and source of obligations.

At a practical level, the separability of rights and complaints matters to our evaluation of particular claims and complaints. Consider the famous legal case of *Palsgraf v. Long Island Railroad Company*, from which the above quotation of Justice Cardozo is drawn. In that case, the railroad's employees negligently pushed a passenger onto a train, causing the passenger to drop the package he was carrying. The traveler's package turned out to contain fireworks, which exploded. The shock and commotion from the explosion knocked over a scale, which landed on Mrs. Palsgraf, injuring her. In a famous opinion dismissing Mrs. Palsgraf's lawsuit against the railroad company, Cardozo explained that, although the railroad breached a duty to the owner of the package, the railroad did not breach any duty owed to Mrs. Palsgraf and she therefore could assert no legal wrong. Because she was not the rightholder, she had no basis for a complaint. But this inference is premised on

precisely the principle that I mean to challenge. If rights and complaints can come apart, then Mrs. Palsgraf could have a complaint—as we may intuitively think that she should—despite the fact that she was not an individual to whom the violated duty was owed. In short, recognizing rights and complaints as distinct moral phenomena will open up a wider range of moral possibilities and potentially alter our first-order moral judgments.

Even if it did not have this wide-reaching practical significance, distinguishing between rights and complaints would be important for questions about the nature and source of our moral obligations. Some philosophers have been drawn to the idea that our capacity to level complaints against one another—to hold each other accountable—is essential to the moral obligations that we owe to one another. To highlight one recent example, Stephen Darwall has influentially argued that morality involves “second-personal reasons,” which are the reasons involved in our authority to make claims on one another. Darwall explains this special kind of authority, in part, in terms of the grounds on which others can make complaints and hold us accountable. He writes, “if [someone stepping on your foot] accepts that you can demand that he move his foot, he must also accept that you will have grounds for complaint or some other form of accountability-seeking response if he doesn’t... A second-personal reason is one whose validity depends on presupposed... accountability relations between persons” (2009, p.4). The idea is that our ability to make claims on one another presupposes our ability to address each other with complaints. Claims and complaints are necessarily part of the same second-personal relationship, each depending on the other. And this dependence

is thought to help illuminate the nature and source of our moral obligations. My arguments bear on any view that, like Darwall's, connects the claims we can make on each other with the way in which we can hold each other accountable. By describing ways in which rights and complaints have different qualities and function independently of one another, I mean to show that neither presupposes or depends on the other.

This is not to deny that there is a distinctly second-personal relationship between moral agents. It is to say that there is more than one. *Ex ante*, we view each other as the source of norms—as generating obligations that we owe to the other person. *Ex post*, we view each other as those to whom we are accountable—as able to address us with complaints to which we must respond. In order to develop the claim that these two relationships are distinct, it is necessary to provide characterizations of the features of each relationship that distinguish it from the other. I will claim that moral complaints arise from the way that individuals can demand justification for the injuries that are done to them. Having a complaint involves having some stake in an action and the actor being unable to offer justification. Neither of these ideas can be explicated in terms of rights. Rights, I will argue, derive from the special respect owed to a rightholder. Rights cannot simply be the entitlement to make a certain sort of moral complaint because they are action-guiding in a more fundamental way. In particular, the rightholder, and not the potential complainant, is the appropriate focal point for moral deliberation and is the holder of a special sort of normative authority. The aim of this dissertation is to show and systematize these distinguishing features of rights and complaints.



Ex ante	Ex post
rights	wrongs
claims	complaints
relational duties (Y owes a duty to X)	wrongings (X was wronged by Y)
obligations	offenses
demanding	holding accountable
permission	forgiveness
enforcement	compensation

**Table 1.1:** Two sets of relations

In describing the distinctly “second-personal” aspect of morality, Darwall describes what he calls “a circle of irreducibly second-personal concepts.” I mean to suggest that there are two such sets of interrelated concepts. It is perhaps instructive by way of introduction to list some of the concepts and relationships that I take to fall into these sets.

Before explaining the distinction between these different sets of ideas, the dissertation begins with the question of what it is to have a right. According to Hohfeld, an individual has a claim-right that another party do X if and only if the other party has a duty to do X. Although the word “right” is used to capture a wide variety of other phenomena, the claim-right seems to be in many ways the most fundamental idea of a right. According to this understanding, rights are bound up with the very idea of the duties that agents owe to one another. Hohfeld’s insight, in other words, is that rights and duties are correlated.

Whatever agreement there is on this skeletal structure of rights and their place in moral discourse, it has not translated into agreement on their source or justification. There are two quite divergent conceptions of the justification for rights. Ac-

cording to one view—commonly called the interest theory—rights serve to protect the interests of the rightholder. The interests or reasons in favor of placing a duty on one party are what generate the rights of the other party. To have a right, then, is to be one whose interests are sufficiently strong, or of the appropriate character, to justify imposing duties on others. Speaking roughly, one might say that the interest theory takes the idea of a prohibition as primary, and infers the related claim-rights. Part of what is attractive about the interest theory is that it reduces the idea of a right to the seemingly more basic ideas of interests and the injuries that can be suffered to those interests. The interest theory is the subject of Chapter 2.

According to a different view—commonly called the will theory—a right grants the rightholder normative control over the subject-matter or action covered by the right. As H.L.A. Hart put it, a rightholder is “a small-scale sovereign.” To say that X has a right that Y do  $\phi$  is to say that X is the one who is entitled to determine what Y does with regard to  $\phi$ . By focusing on the idea of normative control, the will theory attempts to capture the sense in which the duties that correlate with rights are directional—that is, owed to another agent. Again speaking roughly, one might say that the will theory starts with the idea of claim-rights over others, and prohibitions derive therefrom. This focus of the will theory has made it attractive as a way to elucidate the relational character of certain moral concepts—as the recent work of Stephen Darwall and Michael Thompson illustrate. The will theory is the subject of Chapter 3.

I will argue that decoupling rights and complaints allows one to accommodate the central insights, and also to explain the central failings, of these competing the-

ories. The interest theory seems to be on to something by focusing on the offense done by unjustified harms. The will theory, on the other hand, seems correct in drawing our attention to the distinctive powers of the rightholder. But the interest theory generates too many rights claims, and the will theory acknowledges too few wrongs.

My ultimate suggestion is that the interest theory provides the rough materials for an account of wronging and the will theory provides the basic elements for an account of rights. An individual is entitled to complain against another (thus, is wronged by another) if and only if that individual has a stake in the other person's action and the other person cannot offer a justification to the individual. This conception parallels the basic interest-theory elements of harm and justification. On the other hand, a person has a right against another if and only if that person has normative authority over some facet of the other person's conduct, typified by having a claim to certain action. This conception relies on the basic framework of the will theory.

Chapters 4 through 10 develop various arguments for distinguishing between rights and complaints. As I have said, my claim is that rights and complaints are both qualitatively and extensionally distinct from one another. Accordingly, some chapters focus on the claim that rights and complaints can exist without one another. Other chapters focus on the idea that rights and complaints are qualitatively or functionally different such that we should see them as different relations even where they do appear in conjunction with one another. These various arguments—although independent in the sense that the reader might accept one without ac-

cepting another—should be considered mutually reinforcing. The apparent mismatch between rights and wrongs is more palatable if the concepts can be given content independent of one another, and the qualitative differences between the concepts lend credence to the apparent mismatch seen in particular examples.

Some of chapters highlight features of wronging that do not seem to be parasitic on the idea of having a right. Chapter 4 is devoted to examining cases in which a party is wronged as a third party—that is, in which the wrongful action of one person ends up wronging someone who did not hold a right *ex ante*. These third-party cases suggest that having a complaint does not require some underlying right. Even where there is an underlying right, it does not always explain the character or significance of the wrong involved. The magnitude of a wrong isn't always the value of the right implicated. Chapter 6 illustrates this qualitative difference between wrongs and rights by looking at the mismatch between the *ex ante* value of a right and the remedy available when a corresponding wrong is committed. Finally, wrongings seem to involve the standing or capacity to complain, which is not implied by having a right. Parties who cannot complain—ranging from those who have surrendered their standing by virtue of their own malfeasance to non-human animals who simply lack the capacity—may nevertheless have rights. This disparity is the subject of Chapter 7.

Other chapters focus more on rights, and the distinctive features that they offer independent of wronging. The basic idea is that rights are claims that we can make on one another because of a special respect that is owed to a rightholder. For this to present a contrast with the *ex post* relations, and not merely a different per-

spective on the same relationship, the respect owed to a rightholder must amount to something different than simply the idea that we owe it to others not to wrong them. I believe that it does. First, rights are normative—they provide guidance to an agent regarding how to act or not to act going forward. In Chapter 5, I argue that the potential *ex post* complaints of other parties are not suited to serve this normative role. In an important sense, one must aim to do what one owes to others, and not aim not to avoid wronging others. Second, rights give normative control to the rightholder. This is true in two ways. Rights involve not merely being owed certain treatment, but also being able to demand or claim that treatment. In Chapter 8, this difference is discussed in the context of obligations not to think offensive thoughts about others. I argue that, although we can be wronged by such thoughts, we do not have rights against them. Third, rights also give rightholders the power to determine what will count as permissible conduct toward them. This normative control goes beyond being able to determine when one will and will not have a complaint. This difference between consenting—asserting normative control over permissibility—and surrendering future complaint is the subject of Chapter 9.

Although perhaps none of these features of complaints and rights would, on their own, be enough to question the intimate conceptual connection between the concepts that is assumed by moral philosophers, I maintain that, taken together, they sketch a picture of two different moral relations, which play distinct roles in our moral experience. Chapter 10 attempts to offer such a sketch by suggesting analyses of the two concepts. The ultimate picture is one in which having a right

involves being entitled to respect *ex ante* such that one has a claim on the conduct of the other person; wrongings, in contrast, arise *ex post* when an action has involved another person and it cannot be justified to him or her.

But this is merely a preview of the sketch to come. Although any reader who makes it through to those final pages probably has the right to be rewarded with a complete understanding of the relationship between rights and wrongings, the reader cannot—as Machiavelli said—complain if what I have to offer does not rise to this level.

*[R]ights are like houses; just as a house protects us from direct exposure to the forces of nature, so rights protect us from direct exposure to the various forms of violence that pervade society.*

Sonoda Minoru

*Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.*

Ronald Dworkin

# 2

## The Interest Theory

IT IS NATURAL TO THINK OF RIGHTS as a form of moral protection. Rights exist, one might say, as safeguards against various forms of exposure, suffering, deprivation, mistreatment, and indignity. To have a right is to be assured that a particular kind of harm will not be permitted.

This chapter addresses a cluster of theories—referred to as interest theories of

rights—that build on this commonsense idea. Roughly speaking, according to an interest theory, an individual has a right if and only if that individual has an interest that grounds a duty in another party. The origins of this idea lie in Jeremy Bentham, who thought that the principle of utility justifies society in prohibiting certain actions. To be protected by such a legislated prohibition, for Bentham, was to have a right. This explication of the concept is appealingly simple and seems to have a ring of truth to it. But this simple idea faces a difficulty: it offers little connection between the protected interests and the prohibition. I may benefit from the law preventing my neighbor from building skyscraper, but that doesn't seem to transform me into a rightholder. That is, the fact that a particular prohibition protects a particular interest could be incidental, whereas rights seem to involve a connection between a rightholder and the sorts of things that cannot be done to him or her. As a result, the skeletal idea of rights as protections of interests has spawned more sophisticated modern descendants, which seek to articulate more fully the connection between the interest of a rightholder and the prohibition that generates a right.

After discussing Bentham's view, this chapter considers two modern descendants of Bentham's approach. Both seek to supplement Bentham's approach by appealing to the concept of sufficiency. Matthew Kramer spells out the idea of sufficiency in evidential terms—the impairment of the interest must be sufficient evidence that the norm has been violated. Joseph Raz, in contrast, relies on an idea of justificatory sufficiency—the rightholder's interest must be sufficient reason for imposing the relevant duty. Although quite different, both of these approaches



build on Bentham's framework by articulating a connection between the protection afforded to the interest of the rightholder and the prohibition giving that protection.

Although I will suggest that none of these approaches is entirely successful, that claim is not the primary aim of this chapter. Instead, I want to draw attention to something about where the theory starts from, what emphasis naturally emerges, and what general difficulty results. What I want to suggest is that the theory's features—including its shortcomings—are the result of its orientation. The goal of this chapter is to highlight three general features of the interest theories.

First, the interest theory generally takes the concept of a wrong or offense as primary. The core intuition behind the interest theory is, I think, that having a right involves having a special sort of protection against injury.<sup>1</sup> We create rights, the theory suggests, insofar as we deem certain hurtful activities to be impermissible and thereby give potential victims of these activities a special form of protection. The recognition of certain things as wrongs or injustices—as things not to be done—is at the core of the interest theory. In the words of Alan Dershowitz, “Rights come from the human experience of injustice in societies without basic rights. The source of rights is, in a word, wrongs” (2005, p.118).

Second, the interest theory connects naturally with the concept of justification. The theory has a natural appeal to those who view something like interests or reasons as the basic normative building block. This is because it provides an account of rights that links up with the idea of justification. One has a right just when there

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<sup>1</sup> Or, to put the point the other way, rights are an assurance that some interests will be given categorical priority over others. See Dworkin (1978).

are sufficient reasons or interests to justify imposing an obligation. This means that a dispute about rights simply boils down to a dispute about the justifiability of action. Rights are not mysteriously independent normative considerations, but rather derivatives of our moral reasoning. As Raz puts it, “Assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties” (1986, p.181). This connection with justification is, I mean to suggest, the major strength of the interest theory.

Third, one of the interest theory’s main weaknesses is that it seems to proliferate rights. Having an interest that is furthered by a duty of someone else is too indiscriminate. This relation exists in many instances where we would not normally think that a right exists. There must be some tighter connection between the rightholder and the duty. As mentioned already, modern theorists have introduced the idea of sufficiency to make this connection, and I will devote much of the chapter to considering why these appeals still do not seem to solve the problem. What I hope to highlight, though, is that a focus on the wrongs involved with certain harms to our interests naturally tends to cover more than our ordinary concept of a right.

Although this chapter involves, in part, a rejection of various interest theories, I do not mean for it to be a wholesale rejection of the approach. The larger aim is that the three highlighted features of the interest theory—the primacy of wrongs, the connection with justification, and the problem of proliferation—will point importantly towards the correct understanding of relational morality. As I will argue in subsequent chapters, wrongs are strongly tied to justification and wrongs proliferate

erate beyond the realm of rights. It is because the interest theory, in a sense, begins with the idea of a wrong or injury that it has the features that it does.

## 2.1 BENTHAM AND THE SIMPLE INTEREST THEORY

### 2.1.1 SKELETAL INTEREST THEORY

ACCORDING THE INTEREST THEORY OF RIGHTS, someone has a right when they have an interest that is protected by the fact that other persons are under a duty. The basic idea, which has an evident plausibility, is that having a right involves having an interest that is given protection by some set of norms. The basic building block of rights, then, are duties or norms and the interests that are benefited by those duties or norms. (For this reason, this type of theory is alternatively called a benefit theory—the idea being that one has a right when one is in a position to benefit from a duty imposed on another.)

The interest theory tradition owes its origins to Jeremy Bentham. For Bentham, law involves the use of sovereign power to make certain acts crimes and thereby coerce individuals to avoid them. This coercive power of the law ought to be used to promote the utility of society: “Upon the principle of utility, such acts alone ought to be made offences, as may be detrimental to the community” (1838, p.163). Offences—Bentham’s analog to our term “wrongs”—are constructed based on the harm done by their performance.<sup>2</sup>

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<sup>2</sup> While Bentham often speaks in what can sound like descriptive rather than normative language, I think he is actually rather sensitive to the distinction. When he speaks of the law making into offences those things that are harmful, I will take him to be describing what the law *should* make into offences and not necessarily what it does. He writes, “It is necessary, at the outset, to

Bentham thinks that there are interrelated concepts central to a legal system, including offences, rights, and obligations. He describes the concepts in the following way:

[T]o declare by a law that a certain act is prohibited, is to erect such act into a *crime*. To assure individuals the possession of a certain good, is to confer a *right* upon them. To direct men to abstain from all acts which may disturb the enjoyment of certain others, is to impose an *obligation* on them. (Bentham, 1838, p.159)

Bentham views these concepts as essentially different perspectives on the same fundamental idea. He describes them as “born together” and “inseparably connected.” He also thinks that the language of one concept may be translated into that of another: “These objects are so simultaneous that each of their words may be substituted to one for the other” (Bentham, 1838, p.159). For example, saying that I have a right not to be killed is just a different way of saying that killing me would be an offence, which in turn is just a different way of saying that everyone is under an obligation not to kill me.<sup>3</sup>

Though these concepts are inter-definable for Bentham, there is an important sense in which the notion of an offence is the primary concept. As he puts it, “The fundamental idea, the idea which serves to explain all the others, is that of an *offence*” (Bentham, 1838, p.160). This is because the crucial notion for Bentham

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make a distinction between such acts as *are* or *may* be, and such as *ought* to be offences. Any act *may* be an offence, which they whom the community are in the habit of obeying shall be pleased to make one: that is, any act which they shall be pleased to prohibit or to punish. But, upon the principle of utility, such acts *ought* to be made offences, as the good of the community requires should be made so” (Bentham, 1823, Ch. XVI).

<sup>3</sup> Note here the implicit commitment to the idea that rights and wrongs (offences) are different perspectives on the same fundamental relationship.

is that of preventing harms to people's interest. What underwrites Bentham's entire account is the prohibition of actions that are harmful to others. As a result, the concept of an offence is the one that is "fundamental." This is the first example of the way in which interest theories give primacy to wrongs. Because of the focus on the interests to be protected, the central concern for the interest theory is prohibiting—i.e. making into an offense—those actions that will constitute an injury to those interests.

In the basic interest theory approach, there are two components of having a right. The first is that a rightholder is one who has an interest in the performance of an act. The second is that the act is required—that failing to do it is an offence. Thus, the basic interest theory might offer the following definition of a right: X has a right that Y do  $\varphi$  (which might include refraining from some action) iff X has an interest in Y's doing  $\varphi$  and Y is required to  $\varphi$ . This is the bare bones interest theory definition of what it means to have a right. What it captures is the idea that having a right means that one's interests are protected by the duty imposed on another.

This simple definition, however, is insufficient. The problem is that that two conjuncts of the *definiens* do not have any connection to each other. X's interest in Y's doing  $\varphi$  need not be related to the reason  $\varphi$  is required. Imagine that you owe money to a friend and are obligated to pay it back. According to basic interest theory definition, if I place a wager on your paying the money back, then I would have a right that you pay the money back. I would have an interest in your repayment and you would be obligated to repay. This is pretty clearly the wrong result. We do not generally think that I would have a right in that case—you would not

owe it *to me* to repay the money. This is indicative of a general problem for interest theories: the problem of proliferating rights. The problem arises because there needs to be some further connection between the rightholder and the duty. One might say that forging this connection is the flipside of the problem of proliferating rights: the interest theory needs an explanation of why the right is owed to the rightholder. A challenge for any interest theory is how to improve on the skeletal definition offered above in order to avoid this problem.

#### 2.1.1.2 INTENDED BENEFICIARIES

Bentham had an explanation of how to limit rights to the appropriate parties. According to Bentham, the key connection between the interest and the duty is that the interest protected must be the interest that the law intends to protect by imposing the duty. Bentham thought that laws could be distinguished “with regard to the *end* which the law may have in view. Here *end* refers not to the eventual end, which is a matter of chance, but to the intended end, which is a matter of design” (1970, p.31). The reason that my wager on your paying your friend back doesn’t establish a right is that your obligation to pay your friend back isn’t intended to protect *my* interest in your paying. It is intended to protect *your friend’s* interest. That is, your friend’s interest is the type of interest society aims to protect by judging repayment of debts to be an obligation. Since the motivation behind any good legislation, for Bentham, is the maximization of utility, one should be able to discern the end of a law by considering what set of interests are supposed to be protected.<sup>4</sup>

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<sup>4</sup> “It has been shown that the happiness of the individuals, of whom a community is composed, that is, their pleasures and their security, is the end and the sole end which the legislator

The idea of an intended beneficiary thus offers a possible solution to the problem of proliferating rights. One might formulate a new definition of rights: X has a right that Y do  $\phi$  iff X has an interest in Y's doing  $\phi$  which is intended to be protected by making Y's not doing  $\phi$  an offense. The idea is that having a right is a matter of having an interest that is—at least according to the legislator—worthy of protection and therefore the basis for a prohibition on its injury. Notice that the appeal to intended beneficiaries is an appeal to the rationale for the duty. That is, the idea of an intended beneficiary introduces a question of justification. What one does to determine who is a rightholder is examine the justification offered for the duty. One has a right when one's interests are those intended to be protected by the imposition of the duty.

As H. L. A. Hart famously pointed out, appealing to intended beneficiaries does not seem to solve the problem of rights proliferating to third parties. This is because, according to Hart, one may be an intended beneficiary of a duty and yet not be the rightholder. For example, “where there is a contract between two people, not all those who benefit and are intended to benefit by the performance of its obligations have a legal right correlative to them” (Hart, 1982, p.187). Hart fills in the argument in the following way:

X promises Y in return for some favor that he will look after Y's aged mother in his absence. Rights arise out of this transaction, but it is surely Y to whom the promise has been made and not his mother who *has* or *possesses* these rights. Certainly Y's mother is a person concerning whom X has an obligation and a person who will benefit

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ought to have in view: the sole standard, in conformity to which each individual ought, as far as depends upon the legislator, to be *made* to fashion his behaviour.” (Bentham, 1838, p.93)

by its performance, but the person *to whom* he has an obligation to look after her is Y. This is something *due to* or *owed to* Y, so it is Y, not his mother, whose right X will disregard and to whom X will have done wrong if he fails to keep his promise, though the mother may be physically injured. And it is Y who has a moral *claim* upon X, is *entitled* to have his mother looked after, and who can *waive* the claim and *release* Y from the obligation. (1955, p.180)

The problem, according to Hart, is that the mother is the (or at least, an) intended beneficiary of the duty to care for her. But she is not, Hart argues, properly viewed as a rightholder, a designation appropriate only for Y. If this is correct, then the problem of rights proliferating to third parties persists. And the reason why it persists is that even the idea of an intended beneficiary does not capture the sense in which the duty is *owed to* the rightholder.

The idea of intended beneficiary has other problems that may be worth noting in passing. First, the notion of intended beneficiary is indeterminate because it can be specified with different levels of detail. Too definite an intended beneficiary would seem to rule out what should be categorized as offenses. For example, if the people who created the protection against unwarranted seizures never intended the application to wire-tapping, does the law provide protection? On the other hand, too indefinite an intended beneficiary would run the risk of giving no content at all. For example, how is one to know that the laws weren't intended to benefit those placing wagers on good behavior? Second, it is unclear whether the notion of an intended beneficiary can be adapted to moral rights and offenses and not merely legal ones.<sup>5</sup> The teleological language of intended ends may have con-

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<sup>5</sup> This, of course, is not really a problem for Bentham, because he believes that there cannot be rights other than those that are the product of manmade laws.



tent for manmade institutions, but it is hard to see what it would mean to speak of the intended purpose of a moral norm.<sup>6</sup> To investigate the intent behind making something, there must be someone who made it.

## 2.2 KRAMER AND EVIDENTIAL SUFFICIENCY

### 2.2.1 EVIDENTIAL SUFFICIENCY

MATTHEW KRAMER OFFERS a different approach to addressing the problem of proliferating rights to third parties. Hart's example of the contract for the benefit of some third party creates a problem for the interest theory because, if the interest theory is to capture our concept of having a right, it must distinguish the rightholder from those who stand to gain generally. As Kramer puts it,

[W]e have to distinguish the relevant beneficiary from other people whose well-being may be advanced by the execution of the contract... Must [the interest theory] ascribe a right to anyone who might benefit from the carrying out of the contract? If the answer here were 'yes,' then the interest theory would merit no further consideration as a serious theory of rights. (1998, pp.80-81)

Kramer is conceding here that, unless the interest theory can resist the proliferation of rights to any interested third party, it will offer an inadequate explanation of what it means to have a right.

To answer this problem, Kramer picks up on an aspect of Hart's interpretation of Bentham and modifies it. Hart interprets Bentham's idea of intended beneficiary as

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<sup>6</sup> This is not to say that it is impossible to have such an account. Korssgaard (2011, pp.107-09), for example, attempts to construct such an idea.

designating the assigned rightholder by virtue of whatever person's interests would have to be injured if an offense is to occur. As Hart puts it, "we may interpret the statement that a law is intended to benefit assignable individuals (and so confers rights on them) as meaning no more than that to establish its breach an assignable individual must be shown to have suffered an individual detriment" (1982, p.179). Hart's idea is that we can think of a law intending to benefit a particular person whenever an injury to that particular person is essential for finding a violation of the law. Murder laws, for example, create a right in the person who might be killed because finding a violation of the law would require a showing that the person was killed. In short, the idea is that someone is a rightholder if showing detriment to his or her interests is necessary to showing an offense.

This idea that rights exist where a harm to someone's interests is necessary for the existence of a violation narrows the circumstances where the interest theory will posit rights. Not all legal prohibitions will be rights-creating in the way that a prohibition on murder is. For example, failure to pay taxes is prohibited, but there can be a violation of this law without injury to any particular person's interests. And, still more importantly, not everyone who stands to benefit from a law will be a rightholder. For example, if someone places a wager on another person refraining from murder, that person will not be a rightholder because showing his monetary loss would not be necessary to show that a murder has occurred. So the idea that harm to a person's interests is necessary to an offense narrows the ascription of rights by providing an explanation of the connection between the interests of the rightholder and the duty correlated with the right.

Kramer builds on this general idea, but replaces the relation of necessity with that of sufficiency.<sup>7</sup> For Kramer, one has a right when a detriment to one's interests would be *sufficient* to establish the violation of a norm. Here is Kramer's official statement: "[A]ny person Z holds a right under a contract or norm if and only if a violation of a duty under the contract or norm can be established by simply showing the duty-bearer has withheld a benefit from Z or has imposed some harm upon him" (Kramer, 1998, p.81).

The reason why Kramer replaces necessity with sufficiency is that a norm may protect more than one party and therefore generate more than one rightholder. When that is the case, detriment to any party protected will show a violation of the norm. That is, detriment to the interests of any protected party will be sufficient, but not necessary, to a violation. Kramer explains the point formally:

[C]onsider a norm N that calls for two instances of legal protection, S and T. To show that N has been fulfilled, we have to show that S and T both obtain (i.e. 'S&T'). To prove that N has been breached, conversely, we have to prove that 'S&T' is false—which amounts to proving that S does not obtain or that T does not obtain or that both of them do not obtain (i.e. ' $\neg S \vee \neg T$ '). Sufficient but not necessary for proof of a violation, then, is a demonstration of  $\neg S$ . (1998, p.82)

This is a bit abstract, so an example might be helpful. Imagine a law that legally protects the confidentiality of a journalist's sources. Such a law might protect the interests of both the journalist and the source, and, in this sense, both parties are

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<sup>7</sup> "Hart erroneously presumed that the relevant question to be asked is whether proof of Z's undergoing a detriment at the hands of Y will be *necessary* in order to establish that Y has violated a certain norm or contract. In fact, the relevant question is whether such proof will be *sufficient* to establish a violation." (Kramer, 1998, pp.81-82)

rightholders under the law. This can be seen, Kramer would suggest, by the fact that injury to either party's interests will evidence a violation of the law. If a journalist is imprisoned for failing to reveal a source, that will be a violation. And if a confidential source has her identity revealed without her consent (perhaps by a journalist acting in his own interests), that too will constitute a violation of the law. Either injury is sufficient, but not necessary, to show that the law has been violated.

The idea of sufficiency is meant to provide a connection between the interest and the duty. Not simply any interest that is protected by a right will count as the basis for a right—only an interest such that proof of its detriment is sufficient to show a violation of the duty. This rules out interests that are protected merely coincidentally. For example, if you owe me a pumpkin pie, and I intend to give that pumpkin pie to my father, then both my interest and my father's interest are advanced by your obligation. But only an impairment of my interest will be sufficient to establish a violation of your duty. If I don't receive a pie, then you have failed in your obligation. If my father doesn't receive a pie, that does not alone show that you failed in your obligation—perhaps I got hungry on the way to my father's house.

With this in mind, one might wonder how Kramer's account handles the mother in Hart's example. After all, showing a detriment to the mother's interest would seem to be sufficient to establish that the duty has been violated. And, in fact, Kramer accepts that the mother does have a right in this case. Kramer argues that his approach delivers precisely the right result in third-party contract cases:

[The] test will work very smoothly when applied to the scenario of the third-party-beneficiary contract. To prove that Y has breached his contractual duty to X, one need only show that Y has inexcusably failed to make the required payment to Z. In other words, one need only show that Z has undergone an unexcused detriment at the hands of Y. Establishing that fact is sufficient for a successful demonstration of Y's breach of duty.

In other words, while Kramer's interest theory will rule out as rightholders those who have interests that are protected merely accidentally, Kramer contends that intended beneficiaries like the mother in Hart's example really are rightholders.

What, then, of Hart's point that the intended beneficiary does not have the power to enforce or waive the right? Kramer suggests that this is essentially beside the point:

Of course, in England and in most American jurisdictions, X would have a power to enforce his right whereas Z would not have any such power. For the interest theory, however, the unenforceability of Z's right by Z himself does not belie or preclude his holding of the right. (1998, pp.82-83)

The mother (Z) may not have power to enforce or waive the duty, but to infer from that to the claim that she does not have a right would be to simply presuppose the correctness of the interest theory's main rival, the will theory. Arguments like Hart's that assume as a premise that the intended third-party beneficiary of a contract is not a rightholder simply beg the question—they assume that the ability to enforce or waive is the touchstone for being a rightholder (Kramer, 1998, pp.66-68). But this is precisely what the interest theory denies.

For Kramer, being a rightholder isn't about being able to enforce or waive a duty, but rather it is about being a person whose interests are protected. The mother is a rightholder because she gets protection from the contract—she is someone whose injury is prevented by the contract. If she doesn't get the care promised, then the contract has been breached. She is entitled to that care under the contract; she is, in this sense, a rightholder under the contract.

Notice two points about Kramer's view. First, the primacy of the wrong that I highlighted in Bentham is even more pronounced in Kramer. The core thought is that one can understand rights by examining what counts as an injury in violation of a norm. The injury is the focal point. Having a right involves being protected from harm to one's interest. Second, notice that, in a circumscribed way, Kramer accepts a more expansive set of rightholders. Some parties whom other theories might not consider rightholders—like the mother—will count as rightholders for Kramer. And this is not viewed as a problem, but rather as the proper consequence of understanding that having a right involves being protected by a norm. This is not implausible. There is an important intuition behind the thought that the mother has a right to the care: she is more than merely an interested bystander, and the potential detriment to her interests is more than coincidentally connected to the duty imposed by the contract. I will return to this idea in Chapter 4.

#### 2.2.2 PROBLEMS FOR KRAMER

Kramer believes that the sufficiency condition offers the appropriate connection between interests and duties to preserve the interest theory. He suggests that it can

rule out mere coincidental connections, while capturing those interests that are essentially protected by a given norm and that are thereby the basis for a right. But one might still wonder whether this is the case. Does Kramer's idea of sufficiency rule out the problematic forms of rights proliferating to third parties and leave only a plausible subset? Can he say that my father does not have a right that you give me the pumpkin pie, and only that the mother has a right to the care promised her son? It is not clear that he can.<sup>8</sup>

First, the interest theory seems less well equipped to explain those rights that are primarily about having certain powers. For example, in the third-party contract case, we would generally say that the son ('X' in Kramer's passage) is a rightholder—regardless of whether the mother is also a rightholder. So the interest theory must also be able to account for the son's right. The interest theory must be able to point to some interest of the son, detriment to which would be sufficient to establish that a violation of the promissory duty occurred.

A first thought might be that the son has an interest in seeing to it that his mother is cared for. That, after all, does seem like the natural motivation for soliciting the promise in the first place. But this interest does not distinguish the son from other third parties. The mother might have a daughter who equally has an interest in seeing to it that her mother is cared for. Would she also be a rightholder? If so, then there appears to be no way to rule out the father in the pumpkin pie example: my father has an interest in seeing to it that I am given a pumpkin pie. So it can't be that the son is a rightholder in virtue of an interest in seeing his mother cared for.

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<sup>8</sup> Much of this argument is indebted to Sreenivasan (2005, pp.263-64).

A second thought might be simply that the son has an interest in the promisor keeping his promise. But this won't do either. The point of the theory is that a right exists where an interest is present such that detriment to it will show that the relevant norm was violated. The question is what sort of injury would show that the promisor has not kept his promise. The detriment to an interest in the promisor keeping his promise cannot play this role without making the theory entirely empty. And, additionally, it's not entirely clear that it would be adequately circumscribed: in the pumpkin pie example, my father might seem to have an interest in you keeping your promise.

Perhaps one can combine the first two thoughts into a third: the son has an interest in his bringing it about that his mother is cared for. This does seem like it will rule out the third parties in the other cases. The trouble, though, is that this does not seem like an interest that the son must really have. It may simply be important to him that his mother is cared for, not that he be the one to bring it about. So it is hard to see how the theory can explain that the promisee is a rightholder in the third-party contract case.

Second, it is also not clear that the theory can explain how the beneficiary is a rightholder in the third-party contract case. The idea is supposed to be that detriment to the mother's interest is sufficient evidence that the duty has been violated. But suppose that the son waives the promise. In that case, the detriment to the mother's interest is not sufficient to establish that the promise was violated. This suggests that, in general, detriment to the mother's interests is not sufficient to es-



tablish a violation of the duty, because the promise may have been waived.<sup>9</sup> In discussing the case, Kramer slips into saying that “unexcused detriment” will be sufficient. But this shift would seem to make the theory rather empty. It would be sufficient to show an unexcused detriment, but the question of what counts as an unexcused detriment contains the question of whether a duty has been violated.

Perhaps the idea is supposed to be that the detriment is sufficient to show a *prima facie* violation, absent any proof of excuse. Detriment is sufficient for a violation, subject to the violation potentially being excused. It is analogous to how the elements of a criminal offense may be present, and yet there may still be an affirmative defense that could excuse the defendant. This understanding, however, faces a substantial difficulty. When attorneys describe the elements of a crime, they are making a conceptual claim. They are, in a sense, analyzing what the offense involves as a concept. Certain evidence is sufficient to show homicide simply because that is what homicide involves. The question of excuse is secondary because it does not undermine the existence of the crime, but only eliminates guilt. To argue that it was self-defense is not to contend that a homicide did not occur, but to contend that the defendant was not culpable.

Returning to the promise case, if the mother is not cared for, we would not say that this counts, conceptually, as a violation of the contract, subject to a potential excuse based on waiver. If the duty was waived, then no violation occurred. The question of waiver is conceptually bound up with the question of whether a violation occurred at all. And if this is correct, then the presence of a detriment seems

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<sup>9</sup> In fact, as Sreenivasan points out, even the interest of the son would not be sufficient because detriment to him does not strictly show that the son did not waive the duty (2005, p.264).

like it is not generally a sufficient condition.

These troubles suggest a general diagnosis of where Kramer's theory struggles. The basic idea, one might say, is something like this: (1) one has a right when one stands to be wronged by an action; (2) one is wronged by an action when one suffers the sort of injury that shows that a wrongful action has occurred; therefore (3) if one stands to suffer the sort of injury that shows a wrongful action has occurred, then one is a rightholder. (Note that premise (1) is an expression of the primacy that interest theories give to wronging.) The problems described above suggest that premise (2) is false. First, the son seems to be potentially wronged irrespective of any injury that he might suffer. Second, the mother stands to be wronged even though her injury is not sufficient to show wrongfulness. Both of these problems arise because wrongings do not seem to be tied to the existence of a particular injury in the way that Kramer's theory seems to require.

## 2.3 RAZ AND JUSTIFICATORY SUFFICIENCY

### 2.3.1 INTERESTS AND SUFFICIENT REASON

IN DISCUSSING BENTHAM'S NOTION of an intended beneficiary, I noted the problems that would arise from attempting to ascribe intent to moral norms. Joseph Raz averts this problem by replacing the idea of an intended beneficiary with the idea of "sufficient reason." For Bentham, an individual is a rightholder when her interests are *the basis for the intention* to hold another under a duty. For Raz, an individual is a rightholder when her interests are *sufficient reason* to hold another

under a duty. In this way, Raz replaces Bentham's descriptive conception of the interest as being the basis for the duty with a normative conception of interests being the basis for the duty. Put another way, it is not that the rightholder's interest must have been what was used to justify imposing the duty, but rather it must be what does justify imposing the duty.

Appealing to justificatory sufficiency is the crucial feature of Raz's version of the interest theory. His official statement of the view is as follows:

*Definition:* 'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty [to protect or promote that interest].<sup>10</sup>

*Capacity for possessing rights:* An individual is capable of having rights if and only if either his well-being is of ultimate value or he is an 'artificial person' (e.g. a corporation). (Raz, 1986, p.166)

In other words, a person has a right if his interest is what provides the reason why some other person is under a duty. Unlike Kramer's theory in which the interest is used as a form of sufficient evidence, Raz's idea is that the interest provides sufficient reason.

Notice that Raz's definition offers a rather simple explanation of what constitutes a wrong. A wrong to someone is the performance of an action where that

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<sup>10</sup> Frances Kamm notes that, in his official statement of the view, Raz does not specify that the duty must involve protecting or promoting the interest. But he does explain the view in these terms later (Raz, 1986, p.180). As Kamm points out, without this additional condition, the view would seem to have counterintuitive results: "For example, suppose I see that you have a very high level of well-being. That may be sufficient to ground a duty in me to see that your well-being does not improve further (for reasons of equality with others, or because you do not deserve so much well-being). On the first (but not the second) account of rights, you would have a right that I carry out this duty, but that hardly seems true." (Kamm, 2002, p.483). I assume, for this reason, that Raz means for his theory to include this provision.

person's interests were sufficient to hold another under a duty to not to perform the action (or non-performance where interests ground a duty to perform). Raz's definition gives a clear answer to what a sort of thing a wrong is, namely a wrong is an action, in particular, an action that violates a duty.

Oddly enough considering that it is offered as a definition, Raz's definition does not provide such a straightforward answer to what sort of thing a right is. An entity has a right when that entity has an interest that grounds a duty. But what is the right? It is neither the interest<sup>11</sup> nor the duty.<sup>12</sup> Raz has only given conditions for *when* one has a right, but he has not exactly said *what* is a right.

The answer, for Raz, is that rights are a step in between interests and duties. The picture is one of a chain of justification running from interests to duties with rights as the link in the middle. Rights, then, are central stages in a certain form of argument. Raz explains:

The interests are part of the justification of the rights which are part of the justification of the duties. Assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties. They are, so to speak, points in the argument where many considerations intersect and where the results of their conflicts are summarized to be used with additional premises when need be. Such intermediate conclusions are used and referred to as if they are themselves com-

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<sup>11</sup> This should be rather apparent: my interest in not being punched in the nose is not *the same thing* as my right not to be punched in the nose.

<sup>12</sup> "[T]he right is the ground of the duty. It is wrong to translate statements of rights into statements of 'the corresponding' duties. A right of one person is not a duty on another. It is the ground of a duty, ground which, if not counteracted by conflicting considerations, justifies holding that person to have a duty." (Raz, 1986, p.171) Unlike other theories that associate having a right with the existence of a directed duty, Raz thinks there is a gap. The right grounds the duty, but it is not the same thing as the duty or even directly reframed in terms of the duty. For Raz, where there are countervailing considerations, there could be a right without any associated duty.

plete reasons... An interest is sufficient to base a right on if and only if there is a sound argument of which the conclusion is that a certain right exists and among its non-redundant premises is a statement of some interest of the right-holder... (1986, p.181)

This is a bit opaque. One does not normally suppose that the claim “I have a right that *p*” amounts to something like, “The first lemma of an argument about duties can be proven.”

Of course, Raz does not simply mean any stage in the argument, but rather the particular stage at which an interest is recognized as sufficient to ground duties. One can then argue forward from this stage, or lemma, to particular duties. For example, to say that I have a right not to be tortured means simply that I have an interest that is sufficient to prohibit some general class of treatments. One can argue from this right to particular duties in particular cases—for example, to the claim that the FBI has a duty not to waterboard me. One need not appeal all the way back to my interests, although the justification does go that far back.

Nevertheless, one may worry that thinking of rights as intermediate stages in justificatory arguments still doesn’t give them the determinate content that rights seem to have. This worry connects with one of the themes that I have been highlighting concerning the interest theory—the primacy of injury or wrongs. Raz’s account of rights has trouble spelling out exactly what a right is because, in a sense, rights aren’t fundamental concepts for him. Like other interest theories, the basic idea is that certain human interests are the basis for duties. Rights are a derivative of this connection between interests and duties. Raz’s account is honest about this. Wrongs, as I have already noted, are more clearly instantiated in Raz’s view:

to wrong someone is simply to violate a duty for which that person's interests were the justification. Once again, the injury that our norms seek to prevent is the crucial starting point for the interest theory.

This starting point leads Raz's view to focus on justification—another theme that I mean to highlight. For Raz, rights are basically just the byproduct of the fundamental task of determining what norms and duties are justified by sufficient reason. When we are thinking about rights, we are thinking about what constraints on each other's conduct we can justify. Questions about rights are bound up with questions about what reasons we have and what we can demand from one another.

### 2.3.2 SOLVING THE RIGHT/INTEREST MISMATCH

Raz's account suffers from its own problems in relation to third parties. Even Raz's theory, which generally seems to avoid the problem of third-party beneficiaries, may appear vulnerable to examples in which it may seem too profligate. Frances Kamm gives the following example: "[I]f I have a duty to help you by praying to God for your recovery, you still might not have a right that I relate to God in this particular way" (2002, p.483). Other examples might also work: your need for the store's last bottle of aspirin may give me a duty to let you have it, but that does not mean that you have a right that I not buy it.<sup>13</sup> What examples like this suggest is that merely being the source of a duty may not fully capture the way in which a

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<sup>13</sup> I'm actually not sure that these examples are at all decisive. If there really is a *duty* to pray or a *duty* to give up the aspirin, then it does not seem especially problematic to me to say that one has a right to that (although of course not a legal right, because those would not be legal duties). If we merely think that there is strong reason to perform those actions, then Raz's theory need not posit a right.

rightholder is owed the duty in question. I will return to this idea later.

There is another problem for Raz regarding the mismatch between rightholders and interest holders. By saying that one is a rightholder when one's interests ground a duty, Raz's account seems able to block the straightforward third-party beneficiary problem. The move replaces the connection between interests and rights in the simple theory with a stronger one. In the skeletal interest theory, one is a rightholder if one's interests are protected by a norm. In Raz's theory, one is a rightholder if one's interests ground a norm.<sup>14</sup> It is not enough to be protected under a norm; one's interests must be the source of the norm. As a result, mere third parties (Hart's mother, the wagering bystander, etc.) will not count as rightholders.<sup>15</sup>

Unfortunately, tightening up of the relationship between interests and rights-based norms seems, at least superficially, to create an opposite problem. This is because there are rightholders whose interests do not seem to be the primary ground of the duties that their rights entail. For example, parents have a wide range of rights regarding how they choose to raise their children. But an account of parental rights is likely to rely on the interests of children in justifying the prohibitions against state intervention. If it were the case that children were substantially bet-

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<sup>14</sup> Note that, if this were true in Bentham's view, then only the community at large could be a rightholder. For Bentham, any justification for a duty must be traced to the overall welfare of the community. Raz does not share this utilitarian commitment.

<sup>15</sup> See Sreenivasan (2005, p.265): "One version of the interest theory is plausibly regarded as exempt from the third party beneficiary objection. I think Joseph Raz's version may be seen as having solved the problem, which is somewhat ironic, since as far as I know he does not discuss it." I think this is generally correct, although there may still be examples where the idea that an interest generating a duty still seems too profligate. The mismatch problem discussed in this section is, I think, largely the same problem in different clothes.

ter off when the state intervenes in parental choices, then parental rights would be much weaker than they are. In other words, the interests of the parent do not seem sufficient to ground many of the duties owed toward parents, and yet parents do seem to be rightholders. Or—to use another example—it seems that the right to free speech is based largely on the interests of society in free and open debate rather than simply on the interests of the speaker. That is, the interests of speakers may not (alone) be sufficient to ground the duties owed toward speakers that characterize the right of free speech. Or—as a third example—a policeman may have a right to carry and use a firearm, which does not seem to be generated simply from the interests of the policeman.<sup>16</sup>

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<sup>16</sup> To make this vivid, Kamm points out that “it is theoretically possible for a policeman to have a right to use a gun in defense of everyone except himself” (2002, p.485). This third sort of example—wherein a job or position gives one a right which does not appear to be based on that person’s interests—is fairly common. For example, consider the rights of confidentiality afforded to doctors, lawyers, and priests.

Many of these cases, however, may provide less trouble for the interest theory than one might initially think. There are two possible avenues. First, one might plausibly maintain that these are not actually rights of the purported rightholder because they are actually duties as well. That is, one might say that, e.g., doctors do not have a right to confidentiality, but patients do. The duties that protect doctors might be viewed as actually owed to the patient. Although Raz explicitly rejects this move (1992, p.134), it is worth mentioning because it has some plausibility. Still, there are some difficulties with this approach. If the state violates its duty by, e.g., seizing medical records from a doctor’s office, one would, I think, be tempted to say that the doctor and not just the patients has been wronged (assuming, for the sake of argument, that wronging and rights go together). So there is a sense that the duty is owed to the doctor, and not simply to the patients. Moreover, this move becomes harder to sustain when the privilege is one that is discretionary rather than obligatory (as confidentiality often is). Suppose that certain policemen are entitled to carry firearms, but are not required to do so. One cannot, in such a case, straightforwardly say that the general public has a right that policemen carry firearms.

A second response, which Raz does seem to endorse, is to think that sometimes rights are held by persons as agents of others, where it is the interest of the principal that grounds the right. He says, “Some rights are held by persons as the agents, or organs of others. Thus company directors have rights as directors of the company. In such cases it is the interest of the principal which the right reflects. The same applies to rights held by persons *qua* guardians, trustees, and the like.” (1986, p.180) This seems correct, but it is not entirely clear how Raz is entitled to it. If having a right involves having an interest, then it should be a puzzle that an individual would have a right



Raz attempts to provide an answer to this problem. He acknowledges that there is often a substantial mismatch between the interest of the rightholder and the importance of a right. But, he claims, “the main reason for the mismatch between the importance of the right and its contribution to the right-holder’s well-being is the fact that part of the justifying reason for the right is its contribution to the common good” (1992, p.138). For example, the justification for the right to free speech will involve not simply the speaker’s interest in being able to speak but also the common benefit of having a society of free and open exchange of ideas. This is an acknowledgement that interests other than those of the rightholder will sometimes form part—even most<sup>17</sup>—of the justification for the right.

This recognition that the interests of others play a justificatory role seems to contradict the initial appeal to sufficiency. Recall that Raz’s account identified the rightholders as those whose interests are sufficient to ground the duties and not simply as those that are protected by the duties. But here it seems that Raz is acknowledging that some rights are grounded in interests other than those of the rightholder. That is, Raz seems to be allowing that there are rights for which the individual’s interests are not a sufficient ground.<sup>18</sup> How are we to make sense of

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not based on any interest of his. Perhaps the idea is that the individual does have the interest *qua* agent because it is the interest of the principal, but this would need to be developed more.

<sup>17</sup> Raz explicitly acknowledges that in some cases the common good is far more significant than the interests of the individual rightholder: “If I were to choose between living in a society which enjoys freedom of expression, but not having the right myself, or enjoying the right in a society which does not have it, I would have no hesitation in judging that my own personal interest is better served by opting for the first option. I think that the same is true for most people” (1992, p.137).

<sup>18</sup> One option would be to suggest that Raz is simply explaining the mismatch in the stringency of rights and their bearer’s interests. That is, one might insist that the individual’s interests must be sufficient to generate the duty, but that the stringency of the duty could be enhanced by appeal to interests other than those of the individual. Kamm suggests this possibility but does not really

this?<sup>19</sup>

I believe that the key, for Raz, is distinguishing between an interest and what gives an interest its importance. If one draws this distinction, one can say that the individual's interest must be sufficient (on its own) to ground the duties associated with the right. But—and this is the crucial move—one can appeal to interests of others to explain the importance of the individual's interest. In other words, I have a right only if my interests are sufficiently important to ground a duty, but what makes my interest sufficiently important might be the interests of others.

Thus, an individual's interest may take on an importance that far outstrips the well-being they actually get from the satisfying the interest. Raz offers an example:

The rights of journalists (however qualified) to protect their sources are normally justified by the interest of journalists in being able to collect information. But that interest is deemed to be worth protecting because it serves the public. That is, the journalists' interest is valued because of its usefulness to members of the public at large. (1986, p.179)

address it (2002, p.485). But this avenue seems unpromising. First, in many cases, it does not seem plausible to say that the interests of the individual would alone be sufficient to ground the right. For example, the interests of a parent in controlling his or her child's education surely is not strong enough to generate the parent's right over the child's education. Second, given Raz's view that interests justify a "core right" from which more particular rights and duties are derived, it seems difficult to make this sort of clean conceptual divide between the right and the right's stringency. If, by additional stringency, one means that a right generates more extensive particular rights and duties, then, for Raz, that would be a different right altogether.

<sup>19</sup> Kamm suggests that these aspects of Raz's view cannot be consistent: "It is not clear that his account of the importance of a right outstripping the interest it directly protects in the case of the journalist is consistent with his... accounts of the relation between rights and interests. They say that a right is present when an interest of the rightholder is sufficient to give rise to a duty. But if the satisfaction of interests of others is the reason why the journalist gets a right to have his interest protected, his interest is not sufficient to give rise to the duty of non-interference with his speech." (Kamm, 2002, p.485).

Put this way, it is not that the general interests of the community directly ground the journalist's right, but rather they give the journalist's interest its importance, which in turn grounds the right. Thus, one can maintain both the sufficiency claim (that a person has a right only when that person's interests are sufficient to ground a duty) and the mismatch between interests and rights (that a person's rights may outstrip what that person's interests could justify on their own). One can maintain these two ideas by thinking that the importance of a person's interest is not given entirely by that person's interest on its own.

Crucially, it isn't only that the general community has an interest in the journalist collecting sources, that the journalist has an interest in collecting sources, and that these two interests only jointly provide sufficient reason for the duty. If this were the picture, then it clearly would not be the case that the journalist's interest provides sufficient reason for the duty. Rather, the idea must be that the general interest somehow transfers its weight to the journalist's interest: "the journalists' interest is valued because of its usefulness." There are two closely related ways to make sense of this—each of which squares with some things that Raz says. First, perhaps the idea is that the journalist's interest is valuable "instrumentally," meaning that the interest serves as a means to the common good. As Raz puts it, "some rights protect interests which are considered as of merely instrumental value" (1986, p.179). Alternatively, perhaps the idea is that what explains why the interest is a sufficient reason for a duty is an appeal to the broader interests of the community. As Raz puts it, a right exists when there is a sound argument generating duties premised on an interest of the rightholder and "other premises

supplying grounds for attributing to it the required importance” (1986, p.181). I will mainly address the first of these, and return to the second only at the end of the next section.

### 2.3.3 HOW RAZ’S SOLUTION FAILS

Although I think viewing the individual’s interest as imbued with significance by the community offers the most plausible interpretation of Raz, I do not believe that it is ultimately successful. Put simply, I don’t see that the interests of others can figure into a justification for the right without undermining the claim that the rightholder’s interest is sufficient to ground the right. I do not believe that instrumentally valuing the rightholder’s interest can bridge this gap.

First, the claim that instrumentally valuable interests can ground a right is asymmetric with Raz’s claim about the capacity to have rights. Raz claims that the capacity to have rights requires that an entity’s well-being be of ultimate value (or be artificially treated as such). This provision is necessary to rule out the possibility that plants have a right to be watered because they have an interest in being watered that grounds a duty to water them. But why should it be the case that rights can be grounded in an interest the value of which is not ultimate, but only beings whose interests are of ultimate value can be rightholders?<sup>20</sup> In the account of the journalist’s right, the journalist’s interest is taken to have instrumental, not ultimate value. But if instrumentally valuable interests like this can generate rights, why is

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<sup>20</sup> Raz acknowledges the appeal of symmetry here: “It seems plausible to suppose that just as only those whose well-being is of ultimate value can have rights so only interests which are considered of ultimate value can be the basis of rights.” (1986, p.178)

having interests of ultimate value a requirement for being a rightholder?

The puzzle can be made more tangible if we imagine an argument for plant rights. Plants have an interest in living, growing, and reproducing—this is part of what their well-being consists in. It is important to us humans that they perform these activities because it removes carbon dioxide from the atmosphere. At least sometimes, this important function that plants play can generate a duty not to destroy them. Now we can say that, like the journalist's interests, the plant's interests get their importance from the way that they serve the common good. Where they generate duties, they do so because of their instrumental value. It is hard to see why Raz can call one a rightholder and the other not. It is true, of course, that the journalist's interest may also be of non-instrumental value, whereas the plant's interest is not. But that difference is irrelevant to how the interests generate duties—which is the crux of Raz's theory of rights. The asymmetry here gets Raz the correct result,<sup>21</sup> but at the expense of explanatory power. The asymmetry makes it hard to understand what really undergirds rights—having interests, or having interests of ultimate value.

Second, there seem to be cases in which a rightholder has little or no interest in the right at all—it is not that there is an interest that is instrumentally valuable, because there is no interest.<sup>22</sup> Suppose that a strange cult concludes that you are its

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<sup>21</sup> Indeed, Raz's reason for rejecting the symmetrical view is simply that "there are plenty of counter-examples" (1986, p.178).

<sup>22</sup> I don't mean for this argument to be that there can be rights that are not in the particular rightholder's interest. Rather, the idea is that the class of persons to whom the right is given lack any interest to base it upon. So it is not simply the familiar point that sometimes a general right will not serve a particular rightholder's interests, which interest theorists have readily acknowledged. See, e.g., MacCormick (1977, p.202): "It is not necessarily the case that each individual acquiring a right under the law should experience it as a benefit, an advantage, an advancement

deity. This affords you the right to preside over their worship gatherings whenever you choose. But is this right based on some interest of yours? One might think that it is based on your interests *qua* cult deity, a role that you don't yourself value but which can nevertheless have interests. But this raises a different problem: must religious followers view their deity as having interests in order to view him (or her, or it) as having rights? Religious practice often speaks of God as having a right to certain things, but it doesn't seem to be thereby committed to thinking that God has interests.

If these religious examples seem too peculiar, consider a more mundane example of a rightholder who seems to lack any interest in having the relevant right. Suppose there are two different chemicals, Alpha and Beta, that are equally good fertilizers in all relevant respects. Alpha used to be the only certified option, but it has recently come to the government's attention that overall environmental impact is reduced if some farmers use Alpha and others Beta. In order to facilitate this, the government permits farmers to use either Alpha or Beta, on the grounds that the relatively random distribution between the two will achieve the desired environmental benefit. It seems to me that under this policy each farmer has a right to use chemical Alpha (or chemical Beta). The reason why they have this right is that it instrumentally serves the common good. But any given farmer has no interest in which chemical he uses. It's not the case that the farmer has an interest that is

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or protection of his interests... None of that is in any way inconsistent with the proposition that the function of the law is to confer what is considered to be normally an advantage on a certain class by granting each of its members a certain legal right." Raz (1986, p.178): "Though rights are based on the interests of the rightholders, an individual may have rights which it is against his interest to have."

instrumentally valuable, because the farmer really has no interest at all.

Third, notice that the general interests of the community do not simply lend an interest greater importance, but they affect *in what ways* the interest is to be protected or advanced. Consider the American right not to have illegally obtained evidence used against a person at trial. A criminal defendant does have an interest in not having illegally obtained evidence used against her—namely, her interest in not going to prison. But should we say that this interest is sufficient to ground the right because it is instrumentally valuable? In fact, one can imagine such an explanation: this interest will lead defendants to seek to exclude this evidence; excluding this evidence will deter police from obtaining it; we all have an interest in police not engaging in illegal evidence-gathering; therefore, we ought to protect this interest. But the existence of this argument does not mean that a defendant's interest in not going to prison is more important *in general*. The argument does not say that satisfaction of the defendant's interest is any more valuable.<sup>23</sup>

The above points all point towards a fourth and final point: when interests are valued instrumentally, they aren't really being valued as interests at all, but rather as dispositions. When an interest is valued instrumentally, what is valuable about that interest is that it is likely to be pursued by its bearer—not that it actually contributes to the bearer's well-being. What is useful about the criminal's interest in avoiding prison is that it will likely induce her to advocate for the exclusion of evi-

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<sup>23</sup> This argument is similar to Frances Kamm's argument for showing that rights are not built only on interests by considering that some ways of protecting a given interest yield a right and other ways do not yield a right, even holding interests of all parties constant. For example, Kamm suggests that, if there is a killing/letting die distinction, the protection from one but not the other cannot be based on a difference in the victim's interests.

dence. Similarly, what is useful about the parent's interest in educating her child is that it will likely induce her to educate her child, which is a good thing. But in such cases, it is the disposition that is valued—that it is actually in the person's interest is merely coincidental.

This is evident from the fact that a right could be justified in this general fashion without it actually serving an interest of the rightholder. Consider some examples. First, suppose that I have a predictable urge to do something, and I usually act on it, even though I don't really take it to be in my interest. Perhaps, to borrow from Warren Quinn (1993), I simply have an urge to turn on radios. It happens to be the case that there is a social need for someone to turn on radios (perhaps a war has just broken out and all the radios in a previously dormant intelligence command center need to be activated), so the government grants me permission to access its radios. Now it seems to me that I have a right to access the radios. But this has nothing to do with my having an interest in accessing the radios—that my well-being is improved by accessing the radios.

Second, return to the criminal example, but imagine that our criminal justice system were radically better than it is currently, such that it actually were in the interest of guilty criminals (but not innocent individuals) to be punished. Criminals still wouldn't want to go to prison, and they therefore would continue to advocate against being imprisoned. In such a scenario, the rationale for the exclusionary rule described in the previous paragraph would still follow. And we could still say that criminals have a right not to be convicted on the basis of illegally obtained evidence. But this right could not be based on the criminal's interest in avoiding



conviction because, *ex hypothesi*, they would have no such interest.

Or consider a third, more realistic example. It is arguably true that gambling makes people worse off—that it is an addiction that does not advance people's interests. Nevertheless, in many places, we permit people to engage in circumscribed gambling as a way to fund various public endeavors. Where such gambling is permitted, we would, I think, say that people are afforded a right to gamble. But this is not because they have a valuable interest in gambling—it's probably not in their interest at all. What is valued in these cases is our disposition to do something that incidentally benefits the common good. Our actually having an interest is irrelevant, except insofar as we usually pursue our interests.

Once one sees this, it is clear that the interests in the other examples (the journalist's, the parent's, the criminal's, etc.) also seem to be playing a merely descriptive role in the account of why there is the particular duty or norm. The reasons for the existence of the norm are generated by the common good.<sup>24</sup> The well-being of the rightholder isn't really important to grounding the right. The interest only matters because it disposes people to act in a certain way. If this is correct, then Raz's account in a way collapses into something more like Kramer's. The interest starts to seem like a factual rather than normative ingredient in the right. That is, it begins to seem like one has a right when one has an interest and there is a reason for protecting that interest. And, I have already suggested, this does not seem adequately to link the rightholder to the source of the duty.

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<sup>24</sup> Sometimes Raz comes close to admitting as much. He perplexingly describes the claim that there is an interest and the claim that the interest is important as separate premises. If the interest were itself sufficient reason, one wouldn't need a further reason why it was sufficient.

## 2.4 OWING AND RESPECT

THE MAIN PROBLEM FOR THE INTEREST THEORY is adequately explaining the connection between the rightholder and the duty. What is needed is an account of the sense in which the duty is *owed to* the rightholder. For Bentham, the duty is owed to the rightholder by virtue of the intention of the legislature. For Kramer, the duty is owed to the rightholder in the sense that the injury to the rightholder's interest determines whether the duty has been violated. For Raz, the duty is owed to the rightholder in the sense that the rightholder's interests are the source of the duty. The trouble is that even these explications of the sense in which the duty is owed to the rightholder seem inadequate.

I just suggested that the ultimate problem for Raz's view is that, in some cases, what we are protecting is not the interest of the rightholder, but rather the disposition of the rightholder. Raz's explanation of the mismatch between interest and rights appeals to the social importance of certain interests. But what really seems to be at work is the social importance of certain actions. In this sense, Raz's move seemed to be going in the right direction—the journalists, parents, and criminal defendants seem to get their rights in virtue of fulfilling a social role. But this social role isn't that of someone with a particular interest, but rather that of someone who will do something of social importance. What is needed is the idea that rights protect our ability to do things—that is, that rights protect voluntary actions, regardless of whether they are in our interest.

Put another way, having a right seems—at least some of the time—to involve

having one's choices respected and granted protection. The rightholder is accorded a status that affords him or her the discretion to do certain things. Often this protected status will relate to the fact that a rightholder is a person whose well-being is intrinsically valuable and who should therefore be able to pursue that well-being. But sometimes the protected status will have little or nothing to do with the rightholder as a locus of well-being. Instead, it will be about the rightholder as a doer—as someone who plays a role. Either way, what the right seems to involve is respect for the rightholder being able to do something.

This idea that having a right involves having one's choices afforded protection captures a sense in which the duty is owed to the rightholder that seems to be missing in the interest theory. The interest theory can capture the idea that the rightholder is the source of the duty. But it does not seem to capture the idea that the duty is owed to the rightholder in the sense that one's performance of the duty must be guided by respect for the rightholder. It is not enough that the rightholder be the source of the duty, but that the rightholder—to put it metaphorically—has ownership of the duty. My having a right involves my being entitled to certain treatment in the sense that I thereby *possess* control over actions towards me. This ownership of rights is reflected in certain practices constitutive of rights—I might forsake my right, I might transfer my right, I might exercise my right, and so on. As Kamm puts it, the problem for Raz is that, “the duty is not described as a directed duty owed to the person with the right” (2002, p.484).

It is this directional element—that the duty is owed to the rightholder not simply as a source of value but as an actor engaged in a valued activity—that the inter-

est theory is unable to capture adequately.<sup>25</sup> The point is that judging someone to have a right against another is a judgment of a special ongoing nexus of individuals.<sup>26</sup> One agent is bound to the other agent; they are united in a relationship that shapes conduct. This idea of an ongoing nexus of agents is what the interest theory lacks. It cannot capture this nexus because it focuses only on the duty and where that duty came from; it does not focus on how the duty shapes the relationship between the parties going forward. Put another way, the interest theory cannot accommodate the way in which rights involve respect for the rightholder and not just attention to her interests. An important aspect of rights is the way that they not only arise out of, but also are constituted by, respect for the rightholder as a person. In this sense, to say that you have a right that I do  $\phi$  is to say that proper respect for you involves my doing  $\phi$ .

In fairness to Raz, he does acknowledge a related concern, and he thinks that his theory of rights can accommodate it. Raz's response is to say that being given

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<sup>25</sup> This connects, I think, with the criticism that is raised by Gilbert (2004). Gilbert suggests that any account of rights only in terms of protection under a norm will fail to explain the special standing of the rightholder. Such accounts will describe directedness only in terms of the various conditions that apply to the duty. But the directedness needs to be explained in terms of a special standing that a rightholder has. Unfortunately, from my perspective, Gilbert focuses much of her discussion on the standing to complain, which I do not think is the key feature of having a right.

<sup>26</sup> Michael Thompson does describes this ephemeral feature of judgments of rights in the following way: "In all such judging, whatever the determinate form, I may be said to view a pair of distinct agents as joined and opposed in a formally distinctive type of practical nexus. They are for me like the opposing poles of an electrical apparatus: in filling one of these forms with concrete content, I represent an arc of normative current as passing between the agent-poles, and as taking a certain path... This special posture of the mind in coupling certain representations of agents marks the resulting judgements as belonging to the element of *justice*... The mark of this special virtue of human agents, as Aristotle says, is that it is 'towards another', *pros heteron* or *pros allon*; it is, as St. Thomas says, *ad alterum*, or as Kant says, *gegen einen Anderen*." (2004, pp.335-37).

respect is one of our interests.<sup>27</sup> This interest in being given respect is an interest in having one's other interests given due weight.<sup>28</sup> This interest in being respected grounds a duty of respect, and thus, Raz contends, we may say that there is a right to be respected. Raz wants to explain this right to respect as a sort of meta-right: a right to have one's other rights given due consideration.

Being a very abstract right, nothing very concrete about how people should be treated follows from it without additional premises. This explains why it is invoked not as a claim for any specific benefit, but as an assertion of status. To say 'I have a right to have my interest taken into account' is like saying 'I too am a person.' This may perhaps explain its 'deontological' flavour. (1986, p.190)

There is a way in which this seems correct: asserting a "right to respect" would amount to no more than an assertion of moral status. This fact, however, hardly seems to support Raz's claim that respect is just one of the interests people have. On the contrary, the fact that asserting a right to respect amounts to asserting moral status would seem to be evidence that there is no such thing as a "right to respect." Respect is not simply one of the things to which we are entitled, but rather partially constitutes having a right. It is this idea that shapes the approach to rights that is the subject of the next chapter.

To the extent that the interest theory fails—and I do not mean to say that it entirely does—the problem seems to be traceable to its starting point. The interest

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<sup>27</sup> "Rights, one may say, are based neither on the right-holders' interest, nor on that of others. Rather they express the right-holders' status as persons and the respect owed to them in recognition of this fact. This may be a verbal disagreement. For it may be dissolved by responding that a person has an interest in being respected as a person." (Raz, 1986, p.188).

<sup>28</sup> "The duty of respect for persons [is] the duty to give due weight to the interests of persons. And it is grounded on the intrinsic desirability of the well-being of persons." (Raz, 1986, p.190).

theory starts from the idea that rights protect us from certain harms and injuries. This is an important and very plausible starting point. But the ultimate difficulty for the theory is that it does not accommodate the idea that rights are necessarily about doing something—about being able to make certain choices and engage in certain activities. That idea involves a forward-looking, enabling conception; it focuses on what rights allow. It is very different than the thought that rights protect against injury, which focuses on what rights prevent and then reasons backward from the potential injury to the mechanism for preventing it.

The primacy given to injuries and wrongs in the interest theory—although it creates the problems about over-inclusivity and the role of respect—naturally and helpfully connects questions about rights with questions about justification. According to the interest theory, rights violations arise when someone is injured by the transgression of a norm. As a result, questions about rights transform into questions about whether harming is justifiable or whether there is a justification for a norm against that kind of harming. And this makes sense. When we accuse someone of having wronged us, we are accusing them of treating us in a way that was not justified. That morality demands that actions be justifiable in this way is a strong form of protection for us. It is easy to think that this protection is essentially what rights involve.

*By definition rights give the individual zones of unchecked discretionary action that others, whether private citizens or governmental authorities, may not invade. They are entitlements of an individual he or she may claim at his or her election... They are what gives meaning to that article of American faith: that each human being is unique, that by virtue of his humanity he possesses an unalienable and undeniable dignity and worth that he is entitled to the maximum basic personal liberty consistent with like liberty for each other.*

Supreme Court of Mississippi

*For me, I don't like it when there is too much interference in our lives. We're not children. It is our own life in our hands.*

Eric Cantona, GQ Interview

# 3

## The Will Theory

IF THE INTEREST THEORY IS BASED ON THE IDEA that rights give us protection, its rival theory is based on the idea that rights give us control. Rights, it is thought, involve the freedom to govern one's own life. Having a right isn't about having certain interests protected; rather, it is about having a certain sphere under one's own control. The emphasis is on the way in which rights represent a special concern

for the rightholder as an autonomous agent.

This conception of rights has come to be known as the will theory (or choice theory or control theory). The following statement from H.L.A. Hart is a classic articulation of the basic idea:

Instead of utilitarian notions of benefit or intended benefit we need, if we are to reproduce this distinctive concern for the individual, a different idea. The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed. (1982, p.183)

The idea is that rights are about giving individuals their own domain of control. Jeremy Waldron describes the will theory as “essentially connected to a certain distribution of freedom.” (1988, p.128) In short, according to the will theory, rights are about distributing control over the world around us.

As with the interest theory, I think that the will theory captures important aspects of rights-based moral relationships, but I also think that it faces significant weaknesses. The aim of this chapter is to highlight some of these strengths and weaknesses. These features of the will theory—both the positive and problematic—are the result of shifting focus. Instead of starting from the injuries that can arise when a duty has been breached, the will theory emphasizes the powers and practices that are antecedent to a duty's performance or nonperformance. The focus in the will theory is on what happens (or can happen) before a duty is performed, not on what happens (or can happen) afterwards. As a result, the will theory's strengths and weaknesses are something like a mirror image of the interest the-



ory's. Like its rival, the will theory illuminates important features of our moral relationships with others, but it also seems inadequate as a complete theory.

### 3.1 FIRST-ORDER CONTROL AND THE PROBLEM OF NARROWNESS

#### 3.1.1 CONTROL AND WAIVER

THE IDEA THAT HAVING A RIGHT means having a certain sphere of control is intuitively appealing. For example, your right to bodily integrity means that you have control over what other people can do to your body. And if you have a property right concerning an object, then you typically have control over how that object is to be used. But in what sense do you have this control? Obviously, having a right doesn't mean that you get to choose how other people will *actually* behave toward you or your property. Someone might assault you or steal your property, and that would not mean that you didn't have the right. So the control isn't a matter of actual, physical command.

Instead, the control at issue is normative control—it is control over what will and will not be permissible behavior by others. Or, as Hart puts it, it is control over the other person's duty. That is, the control typically involves having choice over the application of the other party's duty. For example, your rights over your body mean that it is permissible to touch you only if you consent to it. Your property right means that you get to decide what will count as a trespass. In short, having a right means that, within a certain sphere, you get to decide what will be permissible for others.

Because the focus is on what the rightholder can do, the will theory assumes an essentially forward-looking perspective. Rights are understood in terms of having a power or authority over what *will be* the case. Whereas the interest theory begins from the concept of harm or injury, which involves the retrospective comparison of a present state with a prior state, the will theory begins from the idea of what a rightholder can do in the future. Having a right is seen as being about having a sort of empowerment.

Through this control over another person's obligations, the will theory sees rights as connecting a rightholder with others who are bound by the right's correlative duties. Consider the following description from Joel Feinberg:

If Nip has a claim-right against Tuck, it is because of this fact that Tuck has a duty to Nip. It is only because something from Tuck is *due* Nip (directional element) that there is something Tuck *must do* (modal element). This is a relation, moreover, in which Tuck is bound and Nip is free. Nip not only *has* a right, but he can choose whether or not to exercise it, whether to claim it, whether to register complaints upon its infringement, even whether to release Tuck from his duties and forget the whole thing. (1970, p.250)

In other words, rights connect one agent with another, as one who is bound by a duty and one who controls that very same duty.

What this connection captures is the way in which rights-based duties are *owed* to the rightholder. In Hart's word, "Rights are typically conceived of as *possessed* or *owned by* or *belonging to* individuals, and these expressions reflect the conception of moral rules as not only prescribing conduct but as forming a kind of moral property of individuals to which they are as individuals entitled" (1955, p.182).

An account of rights should capture this sense that a right is held by someone as a sort of moral property—that the duties correlated with rights are directed toward someone in particular, namely the rightholder.

In the will theory, this directional nature of the duty is explicated in terms of control. The duty is owed to the rightholder in the sense that the rightholder is given authority over its enforcement. Or as Hart puts it, “duties with correlative rights are a species of normative property belonging to the rightholder, and this figure becomes intelligible by reference to the special form of control over a correlative duty which a person with such a right is given by the law” (1982, p.185). The property metaphor is significant here. The rightholder “possesses” a duty in someone else insofar as he has control over that duty—just as possessing property involves having control over its disposition. The picture is essentially about a distribution of normative control.

For Hart, the control involves three distinctive powers: the power to waive the duty, the power to enforce the duty, and the power to demand or waive compensation if the duty is breached (1982, pp.183-84). For example, the property rights of a landowner are exemplified by the legal powers to put up fences or posted signs, to sue for trespass, or alternatively to grant permission to enter or even lease out access. The combination of these powers constitutes the distinctive control involved in holding a right, according to the will theory.

Although various will theorists catalogue the relevant powers in different ways, the crucial point is that the rightholder has the choice about whether—and perhaps to what extent—the other party will be bound. It is not sufficient that one

party is bound by a duty regarding another. Whether the duty is in force must be up to the other party. Because this choice is the crucial element, the will theory tends to be cast as essentially concerning the power to waive or release. Insofar as a party can waive an obligation and release the party that is bound by it, the normativity of that obligation seems to be a matter of that party's control. So, among the three powers that Hart lists, the power to waive tends to get first book- ing. This is because it captures the thought that the relevant duty is a matter of the rightholder's choice and control.

### 3.1.2 INALIENABLE RIGHTS AND REDUCED CAPACITY

The will theory's emphasis on waiver, though appealing, creates a substantial prob- lem. While many paradigmatic rights—especially transactional rights like prop- erty or contractual rights—involve control over the other person's duty, not all rights seem to have this character. That is, not all rights seem to involve control by the rightholder. Some rights seem like they cannot be waived, and some seeming rightholders seem like they cannot engage in waiver. Whereas interest theories of rights face the difficulty of awarding rights too broadly, the will theory faces a symmetrical problem: the problem of not recognizing enough rights.

Not all rights are potentially waived. There are some rights that we normally consider inalienable—life, liberty, and the pursuit of happiness, to name a few. If these rights are inalienable, then the potential for waiver is not a necessary feature of rights. The will theory, then, seems incapable of accounting for the full set of rights.

The problem is not simply that a focus on waiver does not pick out all rights, but that it seems to be descriptively inadequate. While my right to a piece of property might be exemplified by my prerogative to choose who gets access, my right to life hardly seems to be exemplified by a prerogative to choose who gets to slit my throat. The problem is not merely that such inalienable rights seem to exist but also that, as Jefferson's memorable phrase suggests, inalienability seems to be actually a mark of a particular right's importance. The inability to waive inalienable rights seems to exist to protect the rightholder and represents a strengthening of the right. Insofar as the will theory connects having a right to having the power of choice, this is hard to explain. As Neil MacCormick puts it, "if the will theory is correct, the more they are inalienable, the less they are rights" (1977, p.199). So the problem is not simply that some rights seem to be inalienable, but that inalienable rights point back to the idea that rights are about protection and not about waiving.

Inalienability, however, is not necessarily the equivalent to unwaivability (Feinberg, 1978). A right might be waivable insofar as an agent is at liberty not to exercise it on a particular occasion, while a right might be inalienable insofar as the agent can never permanently give up this liberty to exercise it or not.<sup>1</sup> For example, on any given occasion, I can waive my right to my labor—as I do, for example, when I volunteer my energies to another person or organization. But I cannot sell myself into slavery, in that this would involve a complete relinquishment of my right and not simply a decision not to exercise it.

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<sup>1</sup> As Frances Kamm puts it, "[I]t is possible to *waive* even an inalienable right. For example, I may waive, on a given occasion, my right to speak even if I cannot alienate my right to speak. So perhaps inalienable rights are not really a problem for Hart, though non-waivable ones might be." (2002, p.482).

Still, even drawing this distinction, some rights may still seem to involve not only an inability to alienate the right completely but also an inability to waive the right at all. For example, the right not to be tortured may seem to have this character. There is plausibly a duty not to torture another person, which exists regardless of the other person's choice. Each of us owes it to our fellow humans not to torture them under any circumstances, and, as a result, each of us has an unwaivable right not to be tortured.<sup>2</sup> Depending on one's view of the matter, the right to life might have a similar structure. Whether or not these particular moral views are correct, the thought that there could be such rights does not seem conceptually incoherent. If such unwaivable rights are possible, then the concept of a right does not require waivability.

Although the problem for the will theory is evident from such potentially unwaivable moral rights, the difficulty is even more vivid with certain actual legal rights.<sup>3</sup> You have a legal right that I not murder you. This legal right is linked to the protection that you receive from the criminal laws against murder—that is, the criminal law places me under a legal duty not to kill you, and you have a correlative legal right not to be killed by me. The trouble for the will theory is that you have

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<sup>2</sup> It might be argued that this is true only because torture necessarily implies a lack of consent. For any properly specified physical action, it might be argued that a person could waive his or her right not to have that physical act performed on him or her. I suspect that this latter claim is false, but, even if it were true, it is not clear that it offers much of a defense of the will theory. Why must the relevant action be described in physical terms? The problem for the will theory arises if I have a duty owed to you not to do  $\phi$ , and you cannot waive that duty. If the objection imagined is correct, then torture is such a  $\phi$ .

<sup>3</sup> There is a noteworthy correlation between interest theories and a focus on legal rights and will theories and a focus on moral rights. But it seems to me that one shouldn't let this be an excuse for either theory's weaknesses because we want a concept of rights that applies to both. If the will theory does not offer a convincing account of legal rights, that should count against it as a theory of rights generally.

essentially no control over my legal duty. You cannot waive my legal duty not to kill you. As the German cannibal Armin Meiwes learned, the prosecutor's office will not be impressed with even convincing evidence that a victim has attempted to waive his right. In a sense, you can enforce my duty not to kill you, in that you can use force to defend yourself. But in fact, anyone could use force to defend you—it's not a power that is exclusively yours as the rightholder. In short, the will theory seems to lack the resources to say that we all have a legal right not to be murdered.<sup>4</sup>

What the previous paragraph suggests is that my legal duty not to kill you is controlled by society at large. But the control over a legal right may also fall upon a third party—the rightholder herself lacking the power to waive. This happens, for example, if her right is also the subject of a duty. For example, in the United States, an adult citizen has the right to serve on a jury, or more precisely, to be given the chance to serve on a jury (there's no right to be selected). The government has a duty not to prevent you from serving on the bases of arbitrary characteristics like your race, your gender, or your income. But you cannot straightforwardly waive this right—jury duty is not only a right but also (as the name says) a duty. In fact, your inability to waive this right is part of a criminal defendant's right to a trial by a jury of peers. The state cannot strike a black juror for no other reason than her race because doing so “unconstitutionally discriminates against the excluded juror.”<sup>5</sup> But the defendant on trial is the one who has the ability to enforce or waive

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<sup>4</sup> For a will theorist who accepts this conclusion, see Simmonds (1998).

<sup>5</sup> *Batson v. Kentucky*, 476 U.S. 79, 87 (1986); see also *Powers v. Ohio*, 499 U.S. 400, 409 (1991) (explaining that it is the right of the juror not to be denied “a significant opportunity to participate in civic life”).

this prohibition.<sup>6</sup> The juror in question cannot excuse the violation, happy to find any way out of the dreaded jury duty. What this sort of example illustrates, I think, is that sometimes control over the duties that correlate with our rights lies neither with us nor even with society at large, but, insofar as it lies with anyone, it lies with a third party. So here, again, there seems to be a real legal right that cannot be waived.

There is a second problem of narrowness faced by the will theory. The problem described thus far is that certain important rights do not seem to be covered by the will theory. But, in addition to examples of rights that are not susceptible to waiver, there are examples of rightholders who do not seem capable of waiver. That is, the class of beings with the capacity to make autonomous choices about waiving a right appears to be narrower than the class of beings that have rights. As Matthew Kramer writes,

Because infants and mentally infirm people are both factually and legally incompetent to choose between enforcing and waiving their claim against others, and because children older than infants are legally incompetent and sometimes factually incompetent to engage in enforcement/waiver decision they hold no powers to make such decisions. Now, given that the Will Theory insists that claims must be enforceable and waivable by claim-holders if the claims are to count as rights, it leads to the conclusion that the young and the mad do not have any rights. (1998, p.69)

This same thought leads Neil MacCormick to conclude that the will theory must deny a “simple and barely contestable assertion: at least from birth, every child has

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<sup>6</sup> Note that the excluded juror not only cannot waive the violation, but may also be unable to complain against it. As the Supreme Court put it, “The barriers to a suit by an excluded juror are daunting.” *Powers*, 499 U.S. at 414.



a right to be nurtured, cared for, and if possible, loved until such a time as he or she is capable of caring for himself or herself” (1977, pp.154-55). In short, if having rights is based on the fact that, as Eric Cantona bluntly puts it, “we’re not children,” then where does that leave the actual children? Nonhuman animals present a similar problem—those who speak of animal rights presumably aren’t ascribing to animals the capacity to engage in waiver and enforcement.

In the jury duty example above, I suggested that control over one person’s right (or more precisely, control over the duty correlated with a person’s right) is sometimes held by another person. The consideration of those who lack the capacity for waiver makes this even clearer. An infant has a right not to be a subject of medical trials just like the rest of us, but it is the parents who have the power to waive this right and consent to a particular clinical trial.

The general point is that the description of having a right as having control over another person’s duty—in the sense of waiver and enforcement—seems to be too narrow. I take this to be a serious problem for the will theory. And it is a problem that is an interesting mirror image to a difficulty for the interest theory. In the previous chapter, I discussed the way in which the interest theory appears too broad—it would assign rights to third parties who we would not ordinarily consider rightholders. The problem arises because what seems to be the right of one party can often serve the interests of another (third) party. The will theory’s difficulty is the opposite. It seems to be too narrow insofar as it would not assign rights to parties that we ordinarily consider to be rightholders. The problem arises because what seems to be the right of one party can be under the control of another

(third) party. Like the interest theory, the will theory suffers from a third-party problem that seems to give the concept of rights the wrong extension.

### 3.2 SECOND-ORDER CONTROL

#### 3.2.1 A BRIEF DIGRESSION ON HOHFELD

IN ORDER TO ADDRESS THE PROBLEMS OF NARROWNESS, a brief summary of the rights framework developed by Hohfeld (1917) is helpful. Hohfeld recognized that philosophers and lawyers often conflate different uses of the word “right.” In order to clarify the concept, Hohfeld distinguished eight different jural relations. At the first order, X has a *claim-right* against Y iff Y has a *duty* to X. For example, I have a right that you repay your debt to me, and that correlates with your duty to pay me; this is a claim-right. In contrast to a claim right, X has a *liberty* (or privilege) against Y iff Y has *no right* with regard to X. For example, we might say that I have a (liberty) right to decorate my living room how I want, and this correlates with the fact that you have no right to tell me how to decorate my living room. It should be clear that these four first order relations stand in two different relations to each other—as opposites and correlates. As already noted, a claim-right correlates with a duty. As should be apparent, the opposite of a claim-right is a no right; the opposite of having a claim over another’s conduct is when the other person has no duty. Similarly, the correlate of a liberty is a no right; the opposite is a duty. So we can represent the first-order relations in the following matrix (with correlates across from each other and opposites diagonal from each other):

Claim-right	Duty
Liberty	No Right

**Table 3.1:** Hohfeld's first-order relations

In addition to the first-order relations, Hohfeld distinguished four second-order jural relations. These relations are second-order in the sense that they involve the ability to alter first-order relations. For example, a *power* involves the ability to place others under a duty or to relieve them from a duty. The correlate of a power is a *liability*—in other words, X has a liability with regard to Y iff Y has a power with regard to X. It's important to note that these terms are being used in something of a technical sense. We might say that I have the power to relieve you of your duty not to trespass on my land, by, for example, granting you an easement. Insofar as I have this power, you have a liability with regard to me. But, of course, this isn't a bad thing—you're liability is just a potential to be given additional rights. The final two relations are *immunity* and *disability*, which are correlated with each other and the opposites of liabilities and powers, respectively. That is, to have an immunity means that the other person lacks a power, whereas a disability means that the holder lacks a power. Thus we can use the following matrix:

Power	Liability
Immunity	Disability

**Table 3.2:** Hohfeld's second-order relations

This framework is undoubtedly helpful in distinguishing various uses of the

word “right,” but it doesn’t itself provide an account of rights. That is, Hohfeld’s framework is perfectly compatible with either an interest theory or a will theory. Nevertheless, anecdotally, it seems to me that will theorists tend to have a greater affinity for the framework. I suspect the reason is that it emphasizes the way in which having a right (be it a claim-right, a liberty, a power, or whatever) is fundamentally relational. But perhaps it is because the will theory appeals so heavily to the second-order relations. According to the will theory, having a right involves having powers. For example, my rights to my property—be it my claim right that you stay off or my liberty right to decorate my living room—are subject to my control insofar as I have powers—to waive your duty and grant you entrance, or to impose a duty on myself by promising to paint my living room fuchsia.

### 3.2.2 HILLEL STEINER AND THE POWERS OF OFFICIALS

The problem of narrowness arises because it seems like there are rights where the rightholder does not have the second-order power to waive the correlated first-order duty. As was suggested above, it seems like these powers can sometimes be vested in someone other than the rightholder. One might think that by distinguishing between benefitting from powers and exercising powers one can maintain that all rights are, after all, based on powers. As Hillel Steiner argues:

[T]he judicial position of an ordinary citizen can readily be described as that of a third party beneficiary of criminal law duties and ... choice theory rights, correlative to those duties, can straightforwardly be located in state officials. (1994, p.66)

The idea is that the will theory can explain the duties of criminal law as rights-based by appealing to the powers of state officials, rather than powers of the rightholders.

This move faces two substantial difficulties. First, it doesn't really seem to solve the problem of narrowness as much as it just stipulates that there is no problem. The problem was that the will theory seems to deny rights where we ordinarily consider them to be present—such as your right not to be murdered. Steiner's appeal to state officials who have control over the duties in question doesn't solve this problem. If having a right is about having certain powers and if it is the state officials who have these powers, then it would seem that the state officials are the ones with the rights. It's not as though positing that the prosecutor has a right that I not kill you—even if that were an intuitively plausible thing to say—would make it okay to say that you don't have the right. The theory should not only be able to say that there are rights when we think there should be, but also that they reside in the party in whom we think they should.

Second, even if this first problem were not present, it is not always possible to locate a state official in whom the relevant power resides. Return to the example of murder. A prosecutor may have discretion about how to enforce the laws about murder, but a prosecutor certainly could not waive my legal duty not to commit murder. That is, the prosecutor does not have the Hohfeldian power to waive my duty not to murder you. As Steiner points out, state officials must have some powers with regard to this duty, otherwise “we should be very hard put to explain the occurrence of such standard criminal law practices as plea-bargaining and the granting of clemency, pardons, reprieves, paroles and immunities from prosecu-

tion” (1994, p.70). But even these powers fall short of the straight-up power to waive my duty not to kill you. As Steiner admits, “although... officials are empowered to forgive non-compliance with such duties *ex post*, they still lack the power to waive compliance with them *ex ante*” (1994, p.71). And although an autocrat might have this latter power, in a constitutional democracy even the legislature seems to lack this latter power.

Steiner’s answer to this second problem appeals to the Hohfeldian structure of rights. Steiner argues that if a state official lacks the ability to waive a criminal law duty, then such an official is encumbered by a disability. But in Hohfeld’s scheme, a disability implies a correlative immunity. For example, your disability to waive my criminal law duty not to kill you correlates with an immunity in the prosecutor (an immunity from having the right to prosecute removed). But the prosecutor also faces a disability. Steiner posits that this means that there must be some other official who has an immunity. And since this chain cannot continue forever, there must be some state official who has a waivable immunity. As he declares, “Un-waivable immunities (eventually!) entail waivable ones” (1994, p.72). Although Steiner doesn’t really explain how this thought plays out in an actual legal system, it gives him enough confidence to conclude that will theory rights “are very much present in [the criminal system] and are to be found fairly high up in the hierarchy” (1994, pp.72-73).

Steiner’s argument here strikes me as terribly unsatisfying. He is simply positing that, as a structural matter, there must be something waivable at some point. But he cannot point to what that might be. And, furthermore, it’s still not clear

why the existence of some waivable immunity somewhere far afield from the supposed rightholder should count in favor of the will theory. But Steiner's argument actually lays the foundation, almost unintentionally, for a more satisfying defense of the will theory.

### 3.2.3 OUTSIDE THE LEGAL SYSTEM

Steiner's argument is repurposed in an excellent paper by Paul Graham (1996). Graham accepts Steiner's argument that disabilities must imply immunities somewhere in the system. If prosecutors are disabled from waiving criminal law duties, then there must be someone who is the bearer of a correlative immunity. But, Graham says, "in order to overcome the narrowness objection we have to go *outside* the legal system and appeal to a moral theory" (1996, p.266). In particular, Graham appeals to a general contractualist picture. The idea is that we don't end Steiner's regression by assuming that there is some state official "fairly high up in the hierarchy." Instead, the relevant immunity is to be found in the parties who agree to the social compact.

The idea is that rational agents with complete power to create rights and their correlative duties would make some duties unwaivable. As Graham explains,

Ideal agents recognize that non-ideal agents suffer from weaknesses in reasoning, which are particularly acute in the case of children and the infirm. Non-ideal agents may also be subject to coercion, given the inequality of power outside the moral choice situation. Consequently, ideal agents will frame legal and political principles that not only allow for agency but also for the protection of agency. (1996, p.266)

This contractualist picture grounds the inability to control particular duties in the contracting party's control over moral and legal principles. The control is still there; it is just a more abstract, second-level control. I noted above that part of the reason that Steiner's argument seemed unpromising was that, not only could a prosecutor not waive the criminal law duties, but in a constitutional democracy, the legislature could not waive these duties either. Graham's point is that this inability too reflects control—control over the constitutional principles governing the legislature. The control over the duties is manifest in the process of choosing a constitution itself. And this also goes toward answering MacCormick's point that inalienability seems to involve greater rights protection, not less. On Graham's view, inalienability represents a second-order choice to strengthen certain duties in the service of protecting first-order agency.

Now the beauty of Graham's move is that it not only solves the second problem in Steiner's account, but it also offers resources for an answer to the glaring first problem. Steiner's account seemed ill-fated from the start because, even if there were some higher-up official with the relevant powers, that would suggest that the official was the rightbearer and not the citizen. But, in Graham's picture, the regress does end, in a sense, with the citizen herself, albeit with an ideal representative of her. Thus, even where individuals lack the capacity to waive the duty that is owed to them, they ultimately control the duty that is owed to them; their disability is, in a sense, the result of their own imposition. Inalienable and unwaivable rights are viewed as part of the distribution of freedom that best empowers actual citizens into "small-scale sovereigns." In this sense, Graham's picture



resonates with Hart's image of rights as distributing normative control.

Still, one might think that the initial problem of narrowness has not been entirely resolved. The original appeal of the will theory was that it could explain the idea that rights-based duties are owed to the rightholder by the fact that the rightholder has control over those duties. For example, I have a duty not to nose around my neighbor's property. But that duty is owed to my neighbor in the sense that its existence is up to his choice. The duty is owed to a particular, real person, who has control over it. Graham's defense of the will theory does not preserve all of this. The control relevant to Graham is not the choice of an actual rightholder. It is only a matter of hypothetical choice for a hypothetical party. How, then, does the will theory explain the fact that the right in question is owed to the actual person? Put another way, how does having a right necessarily connect to the control of the actual rightholder? If it doesn't, then it would appear that the will theory still cannot account for the full range of rights.

### 3.3 FREEDOM FROM THE CONTROL OF OTHERS

THE CONTRACTUALIST ARGUMENT LINKS the right to its use in justification. The contractualist hypothetical is, of course, merely a device to describe what we can justify to others. To say that your hypothetical representative holds an absolute immunity against my duty not to kill you being waived is to describe a justification for interfering with my freedom. In appealing to the contractualist idea, Graham is suggesting that rights are owed to the rightholder in the sense that there is a justification for a prohibition on certain interference with the rightholder.

One might say that this captures what it is to have a right—it is to have a justification for limiting the liberty of another. According to this picture, all rights are about control after all. But it is not the rightholder's control over the duties of another, but rather the rightholder's freedom from the control of others. The right is owed to the rightholder in the sense that its purpose is to protect the rightholder's control over his or her life.

### 3.3.1 HART'S ARGUMENT FOR A RIGHT TO EQUAL FREEDOM

One way to see the point is by considering a famous argument by Hart. Hart (1955) argued that asserting a right typically involves either giving a justification for interfering with another's freedom or resisting interference by another person as being without justification. For example, you might assert your rights under our contract as a justification for demanding some of your money. Or you might assert your right to free speech in order to resist the government's attempts to shut you up. The basic idea is that, when you assert a right, what you are doing is essentially giving or demanding justification for some interference.

But, Hart argued, if this is correct—if asserting a right involves asserting a justification for interfering with another—then that presupposes that such interference calls for a justification. As he puts it, “unless it is recognized that interference with another's freedom requires a moral justification the notion of a right could have no place in morals; for to assert a right is to assert that there is such a justification” (1955, pp.188-89). Hart thus concluded that there was a conditional argument for a right to equal freedom: if there are any rights—if the practice of asserting

rights is to make sense—then there must be a right to equal freedom. “If we justify interference on such grounds as we give when we claim a moral right, we are in fact indirectly invoking as our justification the principle that all men have an equal right to be free” (1955, p.190). The basic idea is that the very practice of asserting rights presumes that there is a question about how to justify interfering with one another. Or put another way, the practice of asserting protection from others’ interference presupposes some baseline of non-interference.

This picture is, I think it is fair to say, a Kantian one. Hart’s idea of rights presupposing a fundamental right to equal freedom is essentially parallel to Kant’s description of there being “only one innate right”:

Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every human being by virtue of his humanity. (1965, 6:237)

Rights, then, are about giving each person their proper share of freedom. This conception unifies the duty—i.e. the prohibition on others—with the control of the rightholder. The duty exists to give control to the rightholder. In distributing freedom, one person being bound is the correlate of another person having freedom. So control isn’t merely an additional feature attached to certain duties, as the initial conception of the will theory suggested. As Kant explains,

[R]ight should not be conceived as made up of two elements, namely an obligation in accordance with a law and an authorization of him who by his choice puts another under an obligation to coerce him to fulfill it. Instead, one can locate the concept of right directly in

the possibility of connecting universal reciprocal coercion with the freedom of everyone. (1965, 6:232)

The thought is that rights-based duties prevent others from interfering with us, and these duties thereby give us control insofar as they free us from the interference of others.

How does this picture of rights as involving the distribution of equal freedom link up with the narrowness problem? The will theory holds that rights are about having control over a duty of another—they are, so to speak, about giving the rightholder a sphere of normative control. But the narrowness objection points out that many (and important) rights do not give the rightholder control in the sense described. What Graham's argument does is suggest that, even in those cases, we can still see the right as tied to the will of the rightholder. And in this way, it answers the narrowness objection by drawing on the tradition of Hart and Kant in seeing rights as delineating what restrictions on interference mark out the appropriate sphere of freedom for each person. My criminal law duty not to kill you is owed to you in the sense that there is a justification for interfering with your freedom that is based on the moral significance of your own will. Although you don't control the duty, the duty exists as a function of your control over your own sphere. In other words, the suggested answer to the narrowness objection lies in shifting the focus from duties that are controlled by the rightholder to duties that give the rightholder control, which is a broader category.

### 3.3.2 RIPSTEIN'S ARGUMENT FROM HARMLESS TRESPASS

Arthur Ripstein has recently put forward an argument for the Kantian theory of rights that is in general accord with Hart's picture.<sup>7</sup> For Ripstein, rights involve having independence from the control of others. As has already been discussed, this view is a bit different than the basic will theory. The idea isn't that having a right involves having control over another party's duty, but rather that others are under a duty not to exert their control over the rightholder. That is, the theory is less about the control of the rightholder and more about freedom from the control of others. As Ripstein puts it, "You are sovereign as against others not because you get to decide about the things that matter to you most, but because *nobody else* gets to tell you what purposes to pursue; you would be their subject if they did" (2009, p.34). As this sentence suggests, however, the idea is still very much Hart's picture of the rightholder as a "small-scale sovereign" or Waldron's picture of the will theory as "essentially connected to a certain distribution of freedom." The distinctive sovereignty of the rightholder is, for Ripstein, the absence of anyone else's control.

Ripstein argues for the idea that rights are about independence from the will of anyone else by drawing attention to examples of harmless trespass—that is, ex-

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<sup>7</sup> Ripstein says that his view is not a version of the will theory (2009, p.34). I consider his disclaiming the will theory to be based on an unduly instrumentalist picture of what the will theory represents. Ripstein seems to be rejecting the will theory because he takes the theory to hold that rights are a means to increase the choices of the rightholder. As he puts it, "Underlying the other differences between these accounts [the interest theory and the will theory] is a shared conception of rights as institutional instruments that constrain the conduct of others in order to protect things that matter apart from them" (2009, p.34). But it seems to me that, if this were what the will theory amounts to, it would be just a version of the interest theory, treating having choices as the relevant interest to be protected.

amples in which someone is wronged by the interference of another, even if that interference causes no manifest harm.<sup>8</sup> For a variety of reasons—because they’re vivid, convincing, necessarily a bit artificial, and all kind of fun—I want to reproduce a few of Ripstein’s examples.

Suppose that, as you are reading this in your office or in the library, I let myself into your home, using burglary tools that do no damage to your locks, and take a nap in your bed. I make sure everything is clean. I bring hypoallergenic and lint-free pajamas and a hairnet. I put my own sheets and pillowcase down over yours. I do not weigh very much, so the wear and tear on your mattress is nonexistent. By any ordinary understanding of harm, I do you no harm. If I had the same effects on your home in some other way, no one would suppose you had a grievance against me, let alone that you should be able to call the law to your aid. Your objection is to my deed, my trespass against your home, not to its effects... The harm principle cannot provide an adequate account of either the wrong I commit against you or the grounds for criminalizing it. (2006, p.218)

Suppose that you are opposed to the fluoridation of teeth on what you believe to be health-related grounds. You are mistaken about this, but committed to campaigning against fluoridation. As your dentist, I use the opportunity created by filling one of your (many) cavities to surreptitiously fluoridate your teeth, pleased to have advanced the cause of dental health, and privately taking delight in doing so on you, the vocal opponent of fluoridation. In this example, I don’t harm you, and there is even a sense in which I benefit you. I still wrong you because I draw you into a purpose that you did not choose. (2009, p.44)

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<sup>8</sup> There are interesting parallels between Ripstein’s argument from harmless trespass and David Owens’s argument from “bare wrongings,” which Owens describes as follows: “A bare wronging does no one any significant harm... A bare wronging has no *wrong-base*, no basis in facts about human interest which might explain why it constitutes a wronging” (2012, p.127). Despite focusing on similar phenomena, Ripstein and Owens come to quite different conclusions.

If I cause you minor harm, such as the distraction of the few seconds of pain you experience when slapped, the small injury is serious because it aggravates an unauthorized touching. That is why an unauthorized caress or kiss can be a serious wrong, even if the victim is asleep or anesthetized. (2009, p.46)

Ripstein is quite enamored with this type of example. For him, these examples represent an important insight into what rights are essentially about. Because the wrong cannot be explained by reference to any harm, it must instead be explained in terms of the unauthorized nature of the action. And this, Ripstein suggests, generalizes: wrongs are, at their core, about unauthorized interference.

It's worth spelling out the argument a bit more because there are important features that happen outside the juicy details of the examples. I take it that something like the following chain of thoughts captures the way in which Ripstein believes these peculiar examples have something important to tell us about rights in general.

1. When Y trespasses harmlessly against X, Y wrongs X.
2. That Y wrongs X cannot be explained in terms of the harm that Y does to X.
3. If Y wrongs X, it must be either because Y harms X or because Y does something to X without X's authorization.
4. Therefore, that Y wrongs X must be explained by the unauthorized nature of the action.
5. Wrongs are equivalent to rights violations.
6. That X has a right against Y cannot be explained in terms of X's interests.
7. That X has a right against Y must be explained in terms of X's freedom from unauthorized interference.

8. Rights are about independence from unauthorized interference.

Written this way, it is evident that the argument depends on the thought—indicated by premise (3)—that either harm or interference must provide a unified explanation for rights and wrongings. The argument relies on the thought that, if harms to interests cannot do the explanatory work, then interference must. This idea underwrites the transition from (2) to (3) and again from (5) to (6). So the argument basically depends on the idea that there are really only two candidates for explaining why something is a wrong—that it does harm or that it is unauthorized. In this sense, the argument gets off the grounds by already presuming an exclusive competition between interests and control, as explanatory elements.

Proposition (1) is what Ripstein's examples are designed to show. It is noteworthy how artificial the examples all are—one must introduce hypoallergenic pajamas and anesthesia and (presumably) a lack of discovery in order to come up with harmless wrongs. Still, there is little doubt that the examples do constitute genuine wrongs. In addition to being creepy, the examples all generate a sense that the victim has been violated. There is little doubt that, if the victim knew of the trespass, he could certainly complain against it. And the transgressor—in his hypoallergenic pajamas or with his puckered lips—could not escape moral sanction by saying “no harm, no foul.” One might insist that the examples are not truly harmless by introducing a more sophisticated interpretation of harm.<sup>9</sup> While it seems to me that such a response is somewhat plausible, I will not consider it here. Absent a more complicated understanding of harm, I think that we must grant Rip-

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<sup>9</sup> See Dan-Cohen (2009, Ch.6) for an idea of how this might proceed.



stein his premise that there are certain harmless wrongs.

An interest theory might quarrel with claim (2) by contending that the fact that Y wrongs X can be indirectly explained in terms of harm. For example, the harm caused by unauthorized medical treatments is sufficient to generate a prohibition on treatment without consent, and the violation of this rule is what explains the wrong committed by the unauthorized flouridator. Although this line of argument is certainly an important one to play out, it is not one that I wish to focus on. As Ripstein points out, the trouble is that to be successful, the strategy must be able to explain why the prohibitions take the general form when only a subset of the prohibited actions are harmful. These aren't cases in which "[a]lthough no one knows in advance which cases will or will not cause harm, everyone knows that many will, so no one is entitled to an exemption after the fact merely because no harm was caused" (2006, p.223). Sure, some trespasses and medical treatments carry with them potential harms such that there is reason to prohibit them in the aggregate, but not all do. Flouridating or kissing an anesthetized individual is predictably harmless. Our sense that such conduct constitutes a wrong doesn't derive from the sense that it is exposing the victim to a risk, even if no harm comes in some cases. Rather, we prohibit such actions, and consider them to constitute wrongs, because they are violations (trespasses, unauthorized) regardless of whether they expose us to a risk of harm.

Proposition (5) is ultimately the target of this dissertation. Ripstein, like most theorists, assumes that rights and wrongs are flipsides of the same coin, and he therefore transitions quite freely between wrongs and rights. It is taken for granted

that, by describing a fact about certain wrongs, he is showing us something about the nature of rights. I will discuss Ripstein's argument more in subsequent chapters, but there are two points worth raising here, both of which bear on will theories generally as well as on Ripstein in particular.

### 3.3.3 HARM AND DEGREES

Ripstein is committed to the idea that wrongs are not necessarily related to harm. But this creates a puzzle. Generally, the gravity of a wrong depends, in part, on the harm that is done. Your complaint against me will be different depending on whether, while trespassing on your property, I ruin an intimate encounter or accidentally scare off a potential intruder. And, while the dentist who fluoridates teeth without permission does seem to wrong the patient, it is a substantially lesser wrong than the dentist who performs experimental root canal procedures without permission. If being wronged is, as Ripstein suggests, entirely about the imposition on the victim's self-mastery and not on the harm that is done, then there is nothing to explain why harm matters to the gravity of the wrong.

Ripstein acknowledges that harm plays this role. As quoted already, he says, "If I cause you minor harm, such as the distraction of the few seconds of pain you experience when slapped, the small injury is serious because it aggravates an unauthorized touching" (2009, p.46). But why is it that the injury "aggravates" the unauthorized touching? If the unauthorized touching is the essence of the wrong, then why is the harm morally significant at all? Ripstein does not seem to have a

ready explanation here.<sup>10</sup> So, while Ripstein offers a powerful argument for how harm does not matter, his account leaves questions about how harm does matter.

In this vein, Ripstein's focus on harmless wrongs offers a stark contrast with the emphasis of the interest theory. Recall that the interest theory begins from the idea that rights are about protecting us from injury. Ripstein presents a frontal assault on that idea. So, in this way, Ripstein offers the complete opposite picture to the interest theory.<sup>11</sup>

### 3.3.4 PRIVILEGING INDIVIDUAL SOVEREIGNTY

I believe that framing matters in terms of wrongs is counterproductive for Ripstein's argument. To my mind, Ripstein's argument is more convincing as an account of rights violations. Ripstein's focus on interference seems like a plausible explanation of harmless violations. But I believe that there are harmless wrongs that do not have this character. For example, if I think badly or inappropriately of you in an unwarranted way, then it is natural to think of this as wronging you, as

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<sup>10</sup> There is one avenue here that is closed off to Ripstein. It might be tempting to think that the bigger the harm, the further the other person's freedom is undermined. If the dentist gives you fluoride, then it interferes less with your ability to govern your life than it would if he removed all your teeth without authorization. The greater harm makes the domination greater. As plausible as this sounds, I think it is precisely the sort of thing that Ripstein's account is committed to rejecting. Harm does not itself constitute domination. And freedom as non-domination does not assure you that you will not be harmed. So it seems to me that Ripstein cannot appeal to the mere fact that greater harm has been done to show that greater domination has occurred. (In fact, even using the comparative "greater domination" seems a bit odd.)

<sup>11</sup> In another way, Ripstein accepts the primacy given to wronging in the interest theory. He too tries to understand the nature of rights by considering what it is to be wronged. He simply resists the idea that this must be understood in terms of harm or injury. This focus on wrongs makes his view particularly interesting, but, as I describe in the next section, arguably causes problems.

doing you a wrong.<sup>12</sup> Now we no doubt have the intuition that examples like this may not be harmless—thoughts, after all, influence actions. But, as in Ripstein's examples, we could essentially stipulate away any potential harm; the wrongness of the action seems to be independent of the harm. The trouble for Ripstein's argument is that these examples seem to be harmless wrongs and yet they don't really seem to be about interference. If the argument from harmless trespass is that a theory of rights should be able to account for harmless wrongs, then it seems like the argument rules out not only any harm-based theory but also any interference based-theory.

It is tempting to respond that Ripstein's examples of harmless trespasses are fundamentally different from the examples of harmlessly wronging others through impermissible thoughts or attitudes. Ripstein's examples seem to be violations, in a way that these new examples are not. I think this is correct, but there are two ways that one can mean this. It might be meant to describe the internal character—the phenomenology, one might say—of the wrong. Ripstein's napping burglar 'feels like' a violation, whereas someone who simply doubts your character does not. But I think that some non-interfering wrongs do 'feel like' violations. Imagine, for example, that someone sits at home every night (perhaps in his lint-free pajamas) and goes to sleep stroking a photograph of you. To me, this 'feels like' a violation in much the same way that Ripstein's examples do, but this isn't about interference. And, even if there were a phenomenological distinction to be drawn, why should we care that some wrongs feel like a violation, while others feel more

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<sup>12</sup> This topic is the subject of chapter 8. I note it, here, only to suggest a problem with the way that Ripstein frames his argument.

like betrayal or prejudice? If these are genuinely wrongs and if we want our theory to account for such wrongs, then they should matter just as much as the other harmless wrongs.

There is another way to understand the thought that Ripstein's examples involve a violation. One might mean this not in terms of some internal feeling, but rather in the sense that Ripstein's examples seem to involve rights violations in a way that other examples do not. They are trespasses upon the individual's sphere of autonomy. I think this is probably correct—Ripstein's examples do seem to be rights violations in a way that some other harmless wrongs may not be. But if this is correct, then Ripstein's argument doesn't develop an account of rights based on the nature of wrongdoing. Ripstein is not interested in wrongs per se, but in a certain subset of wrongs. This point is highlighted by the fact that Ripstein often squeezes in a seemingly innocuous qualifier. For example, he writes, "you do not wrong me *in the sense that is of interest to us here*" (2009, p.78, emphasis added). Or he writes, "These...types of wrong are, I have suggested, exhaustive of wrongs *that interfere with external freedom*" (2009, p.80, emphasis added). The argument is really about what Ripstein considers to be rights violations. That is, even though Ripstein speaks in terms of harmless wrongs, what the argument really depends on is the idea of harmless rights violations. He is interested in the kind of interference that rights guard us against.

This point may seem like a fairly innocuous clarification of Ripstein's topic. He is focused on violations of our self-governance. But why focus on this category? This question raises a general, deeper concern about the will theory. By focusing

on non-interference, the will theory can seem to privilege an individualistic conception of human life.

This concern was the basis for Karl Marx's antipathy to the "so-called rights of man." Marx believed that focusing on individual entitlements inevitably separates one person from another. As he puts it:

The limits within which each person can move without harming others is defined by the law, just as the boundary between two fields is defined by the fence. The freedom in question is that of a man treated as an isolate monad and withdrawn into himself... The right of man to freedom is not based on the union of man with man, but on the separation of man from man... [N]one of the so-called rights of man goes beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community. Far from the rights of man conceiving of man as a species-being, species-life itself, society, appears as a framework exterior to individuals, a limitation of their original self-sufficiency. (1844, pp.60-61)

Marx's concern is that rights presuppose an overly individualistic conception of morality. Treating people as, in Hart's words, "small-scale sovereigns" means focusing on the boundaries between people. Versions of this concern have been articulated more recently by a range of thinkers. Joseph Raz writes, "My objections to the view that morality is right-based derive from a sense of the inadequacy of the conception of morality in the narrow sense which itself is a reflection of the rejection of moral individualism" (1986, p.216). Charles Taylor (1985) describes rights theory as involved in a pernicious form of "atomism." The common idea here is that morality isn't only about not trespassing on other individuals.<sup>13</sup>

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<sup>13</sup> Consider Taylor (1985, p.209): "For non-atomists, however, this very confidence in their

In this light, Ripstein's focus on noninterference—and that of the will theory generally—is concerning if it immunizes us from moral criticism as long as we act within our sphere of right. Marxists and communitarians draw attention to morally problematic conduct that is not about interfering with the entitlements of others: exploitation, laying off employees, cultural deterioration, pornography, and so on.<sup>14</sup> These kinds of examples suggest that many important wrongs aren't trespasses upon the rights of others.

I believe that other contexts also suggest that rights do not exhaust the moral complaints and criticisms that we would like to make on each other. Elizabeth Anscombe provides a comment that I find insightful on this point. In discussing the case of a doctor who might use a finite amount of a drug to save one person or to save five others, Anscombe writes:

Suppose I am the doctor, and I don't use the drug at all. Whom do I wrong? None of them can say: 'you owed it to me.' For there might be nine, and if one can say that, all can; but if I used it, I let one at least go without and he can't say I owed it to him. Yet all can reproach me if I gave it to none. It was there, ready to supply human need, and human need was not supplied. (1967, p.17)

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starting point is a kind of blindness, a delusion of self-sufficiency which prevents them from seeing that the free individual, the bearer of rights, can only assume this identity thanks to his relationship to a developed liberal civilization; that there is an absurdity in placing this subject in a state of nature where he could never attain this identity and hence never create by contract a society which respects it."

<sup>14</sup> For example: "Communitarians would be more likely than liberals to allow a town to ban pornographic bookstores, on the grounds that pornography offends its way of life and the values that sustain it. But a politics of civic virtue does not always part company with liberalism in favor of conservative policies. For example, communitarians would be more willing than some rights-oriented liberals to see states enact laws regulating plant closings, to protect their communities from the disruptive effects of capital mobility and sudden industrial change." (Sandel, 1987, p.148).

What Anscombe brings out is that one might have a legitimate moral complaint even if there is nothing that one can say one is *owed*.<sup>15</sup> The objection cannot be in terms of interference with the patient's sphere of control. The moral criticism seems to outstrip the rights involved.

And, in fact, one need not resort to such extreme examples to see this. Imagine you could easily open a door for me while my arms are full, but you don't help me. My rights are not violated—you did not owe it to me to open the door; it just would have been nice. Still, it would seem odd to say that I have no moral complaint *whatsoever*. Surely I can feel a little miffed. And it's not just that the world would have been a little bit better—a slightly rosier place—if you'd held the door for me. That leaves out the fact that you did something *to me*. I had a stake in your action, not just as anyone who wants a rosier world. Your action affected me. What the Marxists and communitarians add to this simple example is the fact that many of our dependencies on each other go far deeper than holding a door. They can go to our very identities.

Ripstein is focused on violations of individual sovereignty. But there is reason to question this focus. Ripstein is correct that some wrongs are about interference

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<sup>15</sup> It may be tempting to some to say that there is something that is owed—namely, a chance. However, even if this is correct in the case of a doctor who one might view as having special obligations, it's not clear that it undermines the more general point. For example, if a rich person owns the medicine and decides to burn it as incense, then it seem like each person might complain against this—although none could say to the rich person that they were owed anything, even a chance. Second, it's not clear to me that each person can say that they are owed a chance. This is because it is not clear that the doctor must perform a lottery, let alone a lottery with particular chances. Would the complaint really be same if the doctor gave it to no one, or gave it to the person who have the most “quality-adjusted life years” to gain? For these reasons, it does not seem to me that each person can claim a right to X chance, just as a person holding a lottery ticket could.



with our spheres of control, not about harm. But it doesn't follow that all wrongs are about this kind of interference.

### 3.4 FULL CIRCLE

THERE ARE THREE POINTS that I mean to emphasize about the will theory. First, the strength of the will theory is its ability to describe the way in which rights are owed to the rightholder in terms of the respect for the sovereignty of the other person. The will theory is in its element when it is describing rights as prospective control over future conduct. By seeing rights as a matter of being in control—whether this is having the power of waiver or merely having the assurance of non-interference—the theory gives a clear picture of the way in which rights are owed to the rightholder.

Like the interest theory, however, the will theory also suffers from a third-party problem that seems to give it the wrong extension. The interest theory seemed to give rights too expansively to third parties. The will theory, in contrast, has a problem with narrowness. Many significant violations do not seem to be about a denial of control. This problem arises because control over the relevantly correlated duty sometimes seems to reside in a third party—like a parent or a prosecutor—rather than in the rightholder herself. Sophisticated versions of the will theory may have some resources to address this problem, but its existence is noteworthy.

Finally, the will theory struggles to explain the moral significance of harm. This is true in two ways. The will theory struggles to explain the way in which the harm done to another can seem in some circumstances to be the basis of a wrong

against that person, and the will theory struggles to explain how degrees of harm can matter to the degree of wrong that is done. In a way, this goes back to the first point. The will theory is strongest explaining what one owes to others going forward—respect for their control over their own lives. It is weaker at assessing the damage done.

Although there has not exactly been a single unified argument over the last two chapters, it should be evident that we have, in large part, come full circle. The interest theory starts from the thought that rights protect us from certain harms. It takes as primary the concept of injury and wronging. From there, it builds rights out of the idea that some interests justify prohibitions, and that those prohibitions create protections for those bearing the relevant interests. As appealing as it is, this account has weaknesses. Because third parties can have affected interests, the theory seems to generate too many rights. What it lacked is that idea that being a rightholder involves being in a position to perform a special sort of normative activity.

The will theory starts with what the interest theory lacked. That is, the will theory begins from the idea that having a right involves being able to perform a special sort of normative activity—namely exercising control over the obligation of another. It builds rights on the idea of respect for the choices of the rightholder. But this account, too, has weaknesses. It seems too narrow insofar as it does not capture the violations involved in many significant wrongs. These problems can be partially alleviated by shifting away from a focus on first-order control and towards the more general idea of ensuring each person's freedom from the control of

others. But, even this idea, although describing an important form of moral violation, does not seem to capture the variety of wrongs that we do to one another and the significance that harm plays in such wrongs. And so matters come full circle to the ideas of harm and injury with which the interest theory began.

This sense that the interest theory and the will theory mirror each other's vices and virtues can make the debate between the two seem intractable. And many scholars have come to view the debate in precisely this fashion, calling it "unending" (Alexy, 2002, p.115) and "at an impasse" (Cruft, 2004, p. 379). As one writer describes the state of affairs:

The twentieth century saw a vigorous debate over the nature of rights... Each side declared its conceptual analysis to be closer to an ordinary understanding of what rights there are, and to an ordinary understanding of what rights do for rightholders. Neither side could win a decisive victory, and the debate ended in a standoff. (Wenar, 2005, p.223)

At this point, my sense is that many philosophers now consider the debate to be not only stale but positively unproductive. As competing solutions to the same problem, both theories can appear unpromising.

But I have tried to intimate that the two positions can appear to be describing different phenomena. Each is anchored to a very different feature of morality. The interest theory takes as basic the idea of harm or injury; the will theory begins from the idea of normative control.

These different starting points give each theory a different perspective. The interest theory focuses on harms—something that results from conduct—and infers

backwards to certain ex ante prohibitions against such results. The central issue is about giving a justification for the moral prohibitions. In contrast, the will theory starts from ex ante control, and comes to the idea that wrongs arise from inference with that control. The norms arise from respect for the rightholder's choices.

It is my opinion that these differing perspectives embedded in the two theories give the debate between them its unending quality. Sometimes, especially in thinking about what a duty-bearer should do going forward, a perspective focused on respect for another person's domain is appropriate. At other times, especially in thinking retrospectively or hypothetically about in what sense one individual has wronged or would wrong another individual, our perspective is on whether harm is done and, if so, whether justifiable. As we shift between these perspectives, we may naturally oscillate between finding the interest theory or the will theory more appealing.

My aim in discussing these competing pulls has not been to rehash a stagnated debate. Instead, my hope is that these discussions of the interest theory and the will theory have primed the reader for the idea that the two theories are describing different moral phenomena. Most of the remaining chapters will argue that there is a distinction to be drawn between our ex ante moral relations and our ex post moral relations. If there is such a distinction, then the interest theory and will theory can be understood as corresponding with different sides of it.

LEONATO: *Marry, thou dost wrong me, thou dissembler, thou...  
Know, Claudio, to thy head,  
Thou hast so wronged mine innocent child and me  
That I am forced to lay my reverence by,  
And with gray hairs and bruise of many days  
Do challenge thee to trial of a man.*

Shakespeare, *Much Ado About Nothing*

CASSIUS: *That you have wronged me doth appear in this:  
You have condemned and noted Lucius Pella  
For taking bribes here of the Sardinians,  
Wherein my letters praying on his side,  
Because they knew the man, were slighted off.*

Shakespeare, *Julius Caesar*

# 4

## An Argument from Third Parties

THE PHILOSOPHICAL ASSUMPTION that rights and wrongs are necessarily connected has an attractive simplicity to it. Whether we are wronged would map onto whether we had a claim to begin with, and vice versa. But human relationships are not always so clean and simple. Shakespeare—a great student of life’s complexities—was attentive to the fact that we are sometimes wronged by actions

done to others, not just by conduct directly owed to ourselves. In *Much Ado About Nothing*, Leonato says that he is wronged by the false accusations Claudio makes against his daughter. In *Julius Caesar*, Cassius believes himself wronged when Brutus condemns one of Cassius's friends on whose behalf he had spoken. What Shakespeare knew was that our stake in actions done to others often makes us vulnerable to those actions as well. We are wronged not only by what is done to us, but by what is done to our daughters, our friends, or even strangers with whom our lives just happen to become connected.

In this chapter, I mean to argue that cases like this—cases in which someone has a stake in the duties owed to another person—show that a person can be wronged even when he or she is not the bearer of any independent right of his or her own. In this way, the range of actions in which others can wrong us outstrips the range of actions in which a duty is owed to us. Rights and wrongings are, therefore, not necessary correlates of one another. What we are owed beforehand and what we can complain of afterward are two different things.

#### 4.1 THIRD-PARTY WRONGS

I BEGIN WITH H.L.A. HART's famous example, discussed already in Chapter 2, which he uses to illustrate the failure of a simple interest theory of rights.

X promises Y in return for some favor that he will look after Y's aged mother in his absence. Rights arise out of this transaction, but it is surely Y to whom the promise has been made and not his mother who *has* or *possesses* these rights. Certainly Y's mother is a person concerning whom X has an obligation and a person who will benefit

by its performance, but the person *to whom* he has an obligation to look after her is Y. This is something *due to* or *owed to* Y, so it is Y, not his mother, whose right X will disregard and to whom X will have done *wrong* if he fails to keep his promise, though the mother may be physically injured. (1955, p.180)

Hart argues—I think convincingly—that the son (Y) and not the mother is the rightholder in this case. That is, the contractual duty is owed to the son. It was to the son that the promise was made. That X did not owe the duty to the mother is evidenced by the fact that she could not control X’s performance. She could not demand or excuse performance.<sup>1</sup> In this regard, Hart’s argument seems correct.

But the last sentence of the quoted passage strikes me as, in part, false. Hart says, essentially, that the duty is something owed to the son (Y), and that *therefore* it is the son *and not* the mother who stands to be wronged. The inference here is rather straightforward, and it is not hard to find the unstated premise. Hart assumes, without stating it, that a person stands to be wronged by the absence of something if and only if that something is owed to the person. This premise underwrites a valid inference: The duty is owed to the son, not the mother; one stands to be wronged only based on those things that one is owed; *therefore*, the son and not the mother, stands to be wronged.

It seems to me, however, that we ordinarily would think that the mother stands to be potentially wronged. She has a stake in the duty that is owed to her son, just as Leonato has a stake in the duty that Claudius owes to his daughter. Suppose that the promise to the mother were broken. I think it would be mistaken to say that

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<sup>1</sup> Hart goes on to make precisely this point: “And it is Y who has a moral *claim* upon X, is *entitled* to have his mother looked after, and who can *waive* the claim and *release* Y from the obligation.” (1955, p.180)

the mother has no complaint, as though she were akin to any other mere bystander. It does not seem inappropriate for her to resent X's failure in such a case. Her son arranged something for her, and as a result of X's actions, she has not received it. The law would most likely allow the mother to sue for a breach of the contract.<sup>2</sup> And one can imagine X apologizing to the mother or the mother forgiving X. In short, it seems that all of our practices suggest that the mother is among those who have standing to feel aggrieved by X's action.

I believe that these two descriptions of the case should be taken at face value. The mother *does not* have a claim-right against X—this is Hart's main point. But she *is* wronged by his action—this is, one might say, Shakespeare's point. If this is correct, then the unstated premise that underwrites Hart's inference must be incorrect. It is not the case that one only stands to be wronged by those matters in which one is owed something. Taking these descriptions seriously means giving up the theoretical presupposition that rights and wrongings are inexorably linked.

My argument for giving up this assumption is driven both by concrete examples in which these relations seem to come apart and by theoretical considerations about the different moral functions that these relations play. Elsewhere, I will offer theoretical reasons for thinking that rights and wrongs represent fundamentally different moral relationships. But first it is incumbent upon me to illustrate the actual divergence of these moral relations in concrete examples. Hart's example provides the first glimpse of such a divergence.

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<sup>2</sup> This is true as long as the contract is intended to benefit the mother. See Restatement (Second) of Contracts §302 (1981). A typical example can be seen in *Smallwood v. Central Peninsula General Hospital*, 151 P.3d 319 (Alaska 2006), in which a Medicaid patient was allowed to sue for breach of a contract between the state and the hospital to provide care.



I do not expect a single example to be convincing on its own. The reader may be initially inclined to preserve the correlation by explaining particular examples differently. There are two natural temptations. One is to maintain that the third party is not, in fact, wronged. If this is meant to engage my argument, then it should not be a merely linguistic point. One might stipulate that “wrong,” when used as a verb and noun, refers only to rights violations.<sup>3</sup> But this would not address the substantive claim that there is another distinct moral relation in such cases—call it what one may. To maintain that Leonato and Hart’s mother are not wronged in this substantive sense, one must be prepared to say that they do not have any unique moral standing to complain—that, morally, they are just like any other bystanders. Perhaps this is plausible in one or both of these particular cases. But further examples will hopefully suggest the implausibility of this as a response across the board. We have settled commitments about wrongs—commitments about the appropriateness of complaint, resentment, apology, forgiveness, compensation, and so on—that cannot be captured by focusing only on rights violations. To deny flatly the phenomenon of third-party wronging is, I think, paying too great a cost to preserve theoretical cleanliness.

The other temptation is to explain the way that third parties are wronged in terms of more subtle claims. That is, one might think that parties like Leonato and Hart’s mother actually do have claims—something that is owed to them—though not in the ordinary way that a direct rightholder does. Wrongs, it is maintained, are still to be explained by the existence of some prior claim. The remainder of this

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<sup>3</sup> I think that, as a claim about English usage, this is false. We do use the word “wrong” to pick out a distinct notion, and I take this to strengthen my argument.

section is devoted to presenting further examples that respond to various forms of this argument.

#### 4.1.1 DERIVATIVE RIGHTS

A first thought might be that third parties can have rights that are dependent on the rights of others. The thought is that wronged third parties have do rights, but rights that that derive from, or piggyback on, the rights of others. If this were the case, then one could explain how individuals are wronged by the violation of others' rights by appealing to some right of theirs, albeit a derivative right.

The initial appeal of the approach is obvious. One wants to say that the mother has a stake in the matter—she is no mere bystander—and yet one wants also to acknowledge Hart's point that the son, and not the mother, is the one to whom the duty is owed. And the proposed solution accomplishes this by placing a right in the mother, but only a secondary, derivative right.

Frances Kamm suggests both this initial appeal of this approach and the inherent difficulty in it:

What if my mother got only a derivative right contingent on my right? My waiver would give me a power to revoke her right and so would be the dominant right. Yet it would not be the only right. But if she had such a right, why is she unable to singlehandedly waive the right (as I can) rather than merely set conditions for its being acted on? (2002, pp.481-82)

However appealing, this approach faces difficulties, as Kamm intimated. An initial problem is that it does not appear that anyone who stands to gain from another

person's right is also a derivative rightholder. For example, if you pay a contractor to make improvements on your property that will have the incidental effect of improving your neighbor's property value as well, it would be peculiar to say that your neighbor has a right, even derivatively, that the work be completed. Although your neighbor's interests in such a case may piggyback on yours, it does not follow that her rights do. Put more generally, if Y has a right that X do  $\phi$  and Z has an interest in X doing  $\phi$ , it does not seem to follow that Z has a right that X do  $\phi$ .

But this actually understates the difficulty of appealing to derivative rights. It is not merely that such derivative rights do not seem to exist in fact; such rights do not seem like a coherent possibility. The problem is that one cannot say what a derivative right amounts to, other than a theoretical placeholder. As Kamm points out, if the mother cannot demand or waive performance on her own, then what does it mean to say that she is a rightholder?

The essential difficulty lies in explaining how the same right could be vested in different people at the same time. A comparison may be useful. Often, one may transfer a right that one has to another person. For example, if I have a contract with a bank to pay me certain sums of money, then it may be the case that I can transfer some or all of my rights under that contract to you. Such transfer isn't always possible, but it often is. When such a transfer occurs, you become the 'obligee,' so to speak, of the obligations that were originally owed to me. In such circumstances, your right would be dependent upon my right, in the sense that what you have depends upon what I had. What is important to see, however, is that the bank's duty is owed either to me or to you, but never both. You acquire

rights only insofar as I give them up.

What this analogy highlights is the conceptual difficulty with thinking that the same right resides in two different people simultaneously. But this simultaneous possession seems to be required for the notion of a derivative right. The idea is not that the son has a right to certain actions and that he transfers this right to his mother. This would be perfectly intelligible, but in such a case the son would no longer be a rightholder. Instead, the idea is supposed to be that the son is the rightholder and the mother is *also* the rightholder (but dependently). The mother gains a claim without the son giving anything up. But how can this be possible? This is the force of Kamm's point about waiver. If the son is the one who can demand or waive performance, then the mother doesn't have the power to waive performance. So it becomes hard to see what the mother's supposed right would involve.<sup>4</sup> Put very roughly, the problem is that there is only so much normative power to go around—if it belongs to the son then it can't belong to the mother also, and vice versa.

This principle creates a serious problem for any appeal to derivative rights. Instead of thinking of the parties' rights as involving the same powers—which raises the problem that something cannot be in both hands at once—the parties must have rights with different content. As I see it, there are two ways that this might be possible.

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<sup>4</sup> Waiver is only one part of the bundle of powers that may be associated with a particular duty. And it is conceivable that these different parts of the bundle may be split up among different people. It may be, for example, that the son has the right to demand or waive performance but that the mother has the right to determine certain aspects of how performance is rendered. But for each particular aspect of the bundle that composes the duty, it will be vested in either the mother or the son but not in both.

First, it could be the case that the primary party has the right *that* the third party receive certain rights. For example, you might make a contract with me according to which you will promise Sophie a new bicycle. Here, I have a right that you will give Sophie certain rights. Sophie's rights are derivative, but they don't cut into my rights. They are new, additional rights. We might impute this structure to the contract involving the mother. That is, we might think that the son has not hired the caregiving to render services to his mother; rather, the son and the caregiver have an agreement that the caregiver will owe something to the mother. Giving the mother a right was part of the agreement.<sup>5</sup>

While this is definitely a coherent arrangement, it isn't the arrangement in Hart's example. Hart's example is the simpler, more straightforward case. Hart's main point is that the right to care isn't owed to the mother, but to the son. It is fruitless to note that we can imagine an alternative scenario in which this is not the case. The problem is that, even in the simple case in which the mother has not been specifically made the rightholder, she might still be wronged. In fact, the contrast between these two possible agreements only makes clearer that the mother in Hart's example does not receive a right under the agreement.

A second, more promising response builds on the comparison with transferring rights. Although one cannot simply posit a dependent right in the mother without any reduction in the son's rights, one might be able to describe some relationship

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<sup>5</sup> The contract law rules concerning third parties involve some aspects that seem to imply this structure. In particular, a third party can generally sue to enforce a contract only if that was the intent of the contracting parties. But other aspects of the rules are incompatible with this conception. For example, the third party need not be identified at the time of the contract. Restatement (Second) of Contracts §308 (1981).

between the mother and son that accounts for a distribution of the rights between them. The mother would hold some of the rights and the son would hold some of them. That is, when the son acquires his rights, part of those rights automatically transferred to the mother, perhaps due to an existing normative relationship between the two of them.

Consider an analogy. Suppose that you own a house, subject to a bank mortgage. You lease the house to a tenant. You are the one to whom the rental payments are owed, but the bank also acquires certain dependent rights—for example, a right to the tenant’s rental payments should you fail to make your mortgage payments. In a sense, you have transferred some part of the obligations owed to you, to the bank. But this transfer occurred automatically, by virtue of your relationship with the bank, which existed before the rental agreement was made. The point is that, if two parties are appropriately related, then the rights of one party may be shared with the other by virtue of that relationship. This way of thinking about derivative rights does not involve the difficulty of positing additional rights. It does, however, require an account of the relationship that creates this important rights-sharing role.

#### 4.1.2 SPECIAL RELATIONSHIPS AND RESPONSIBILITIES

Family relationships introduce a great deal of moral complexity. Undoubtedly, the mother-son relationship colors our reaction to Hart’s example. And the Shakespeare examples turn on the protagonists’ roles as parent and friend. Someone who is skeptical of my view is likely to think that these special relationships muddy

the water. While it may superficially look like there are wrongs without underlying claims, these background relationships may operate to share or distribute rights among related parties. The wrongs to third parties, then, are ultimately based partly on the subtle and complex claims that exist within special contexts.

I don't want to deny that we have special, morally significant relationships with others, especially family members. In fact, my argument depends on the idea that we often have a stake in what is done to other people, and family members are a prime example of this fact. If we sanitized all examples of complex human relationships, it might be more plausible to claim that wrongs only arise when the wronged person's rights are violated. But the world is full of these complex relationships, and it would be folly to ignore them. What I want to reject, however, is the suggestion that these special relationships create rights or claims that can explain the apparent examples of third-party wrongs.

The most aggressive version of this suggestion maintains that, due to the bonds of family, we cannot distinguish the rights of one family member from those of another. Leonato is wronged when his daughter is wronged because the claims of his daughter are also his claims. The mother is wronged when her son's rights are denied because his rights are also her rights. Family relationships blur the distinction between individual rightholders. There are wrongs to family members because we cannot separate one family member's claims from another's.

This suggestion is unappealing. It involves a flat denial of Hart's point. It maintains that, in no sense, can we say that the duty is owed to the son, not the mother. And, substantively, it involves the extreme and outdated premise that families or

households are a single unit, such that we cannot distinguish rights or claims of individual family members. In Shakespeare's time, a promise to marry may have been given to the father as much as to the daughter. But, this archaic conception of marriage is hardly required in order to understand Leonato's grievance.

The appeal to special relationships need not be so extreme. A more plausible idea is that special relationships create special underlying claims, which affect the cases. For example, we may think that the son has a responsibility to care for his perhaps elderly mother. She is wronged because she was entitled to her son's care. Because the contract was the son's attempt to do what he owed his mother, the mother acquires his claims under the contract. Similarly, one might think that Leonato has a complaint against Claudio because Leonato has a responsibility for his daughter's welfare, which Claudio has harmed.

Something should be said about the idea of a responsibility. Responsibilities are different from ordinary duties in being more outcome- and less action-oriented. If you have a right that I teach you what I know, that reflects certain actions that I am under a duty to perform. If, in contrast, I have a responsibility to educate you, it amounts more to an obligation to see to it that you learn. This difference cuts two different ways. On the one hand, the responsibility seems weaker than a duty in that I could fulfill the responsibility even if I get someone else to do the teaching. States rather than actions are what seem to be owed. On the other hand, the responsibility seems to be stronger because I can fulfill the right even if everything I know is false, but, unless you end up educated, the responsibility has not been fulfilled. Success matters more. So, in this sense, responsibilities are



different from ordinary duties-correlative-to-a-right.

The suggestion being countenanced is that, where one party has responsibility for another party in some way, the parties may acquire certain additional rights, even if they are not the primary rightholders. For example, one might think that the son's responsibility for his mother means that the mother has some claim on her son. When the son contracts to get care for his mother, he is attempting to fulfill this claim. The mother is wronged by the bad caregiver because he prevented her son from fulfilling his responsibilities as her son, and, in this sense, he denied her that to which she was entitled.

This line of thought would need to be spelled out more, but I think it is a non-starter. To begin with, it's not clear that the gift example depends on a special relationship of responsibility.<sup>6</sup> The donor or the recipient might be different without, I think, altering the result. For example, the mother would, I think, have essentially the same complaint if the hiring party were not her son, but rather an unrelated benefactor or a charitable organization.

Or consider a different recipient. Suppose that instead of hiring X to aid his mother, the son decides that he wants to perform a random act of kindness by giving away most of his fortune. He assembles a list of thousands of people who have in some way or another contributed to the community—schoolteachers, nurses, veterans, and so on. At an event for these people, one person's name will be randomly drawn and a large cash prize will be awarded. There will be one of those oversized checks and confetti and whatnot. X has been hired to arrange every-

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<sup>6</sup> In fact, nothing in Hart's original example shows that such a relationship existed or that the contract was fulfilling any kind of responsibility.

thing. When the name is finally drawn, it turns out to be you! But, in a Hollywood plot twist, X is a skillful con man who has absconded with the money.

It seems to me that you will feel that you have been wronged by X. I would. The feeling would not be the “aw shucks” attitude that you might have upon discovering that your ticket was one digit away from winning the lottery. You would feel aggrieved, I think. If you ever met X, you might have something to say to him. But your complaint wouldn’t have anything to do with any right of yours. Although it may feel as though X has stolen money that was ‘as good as yours,’ you did not actually have a property right.<sup>7</sup> Nor would your complaint be based on any reliance on your part, because you did not rely on receiving the money. The son had no responsibility to give you the money. In fact, you have no substantive relationship with the son whatsoever.<sup>8</sup>

There is one relationship that you do have with the son: that of being his intended beneficiary. Of course, this is a looser sense of ‘intended’ than in the case of the mother, in that he didn’t really intend *you* as his beneficiary as much as he intended *whoever it was* whose name got pulled out of the random drawing. One might still cling to the idea that you have a right because the son has a right and

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<sup>7</sup> In regards to ownership, the difference between ‘yours’ and ‘all but yours’ is critical. Rights serve to distinguish a point at which the property shifts from being one person’s to another’s. Up until such a point is reached, a person does not have a right to the property. After that point, the original owner must give up the right in question. Of course, all associated rights need not transfer at once. Some aspects of ownership can transfer before others. But with regard to any particular normative power—any “stick in the bundle” as lawyers would put it—it must lie with one person or another. For this reason, a vested right is very different than one that is merely anticipated.

<sup>8</sup> Some readers may find this example less compelling because you have not been harmed, but only failed to benefit. As my discussion makes clear, I do not think that this difference is crucial. Wrongfully failing to benefit someone can, I think, constitute a wrong. But the concerned reader will find examples of positively harming third parties in the next section.

you are the one who was supposed to be the beneficiary.

However, at this point, the idea ceases to be about a special, preexisting relationship. The relationship of intended beneficiary is too flimsy. Notice, for example, that the son might only have wanted to give the money away for a tax benefit or as a public relations stunt—that you benefit might have been irrelevant to him. The example relies on a confluence of your interests with the son’s rights, but that confluence could be entirely accidental. It could just as well have been that X’s violation of the son’s rights prevented a large amount of money from falling out of the sky and landing in your backyard.

#### 4.1.3 NEGLIGENCE

That the rightholder and the injured party need not be connected at all is, I think, ultimately correct. There need be no particular relationship between the person to whom the duty is owed—that is the rightholder—and the person who ends up being the primary victim of the duty’s violation.

Suppose that you overhear your coworker talking to a customer at work. Your coworker tells the customer that the South Bridge has been fixed and is now operational. You don’t think anything of it at the time. But later that day, you are suffering from an asthma attack and need to rush to the hospital. You try to take the South Bridge only to find it closed, and you end up in a great deal of distress. The next day, you ask your coworker why he said the South Bridge was fixed. Your coworker responds by saying that he was lying because he doesn’t like the customer

and wanted to play a nasty joke on him.<sup>9</sup>

It seems to me that you might intelligibly complain against your coworker's actions; you would not be mistaken in feeling wronged. The familiar package of emotions and practices would seem to apply: resentment, apology, forgiveness, etc. This is not, however, because the coworker violated your rights in any obvious way. And it certainly is not because the receiving coworker had a responsibility to make sure you didn't hear anything false, from which you might have a derivative right.

The reader inclined to preserve the correlation of rights and wrongs is likely to appeal to a different explanation for the wronging in this case. It will be noted that your coworker seems to have been negligent in spreading his falsehood. Thus, in seeking some right of yours that the coworker violates, a natural candidate is a right not to be negligently subjected to false information. Your coworker wrongs you by spreading misinformation. He ought, according to this line of thought, to have recognized the possible harms of such an action. His failure toward you is one of carelessness. It might even be suggested that your coworker would not have wronged you if he had taken every precaution not to be overheard, but had been foiled only by your eavesdropping. Thus, he is in a position to wrong you only because he did not take such precautions.

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<sup>9</sup> For a real example presenting a similar problem about third parties and duties of truth, see *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997). In that case, a 13-year-old girl sued the former employer of the vice principal who sexually assaulted her, because the former employer had given unreservedly positive references for the vice principal position despite knowing of prior charges of sexual misconduct and impropriety. The court decided that the former employer was liable to the girl, but the court's attempt to force this conclusion within a rights-based framework is quite problematic.

There is, I suppose, a duty not to spread false information negligently. For example, if one is rehearsing a play that bystanders might mistake for reality, one ought to take precautions, such as rehearsing in privacy or providing warnings. It is not outlandish to suggest that this same obligation explains the wrong in the example of the overheard lie. But there are significant problems for such a proposal.

First, even granting that such an obligation exists, it is not clear that it is an obligation that is correlative to a right. Although the liar or the actor should perhaps be cognizant of potential bystanders, a bystander would not necessarily be able to claim an entitlement to be shielded from the falsehoods, e.g., “You owe it to me to do that behind closed doors.”<sup>10</sup> Notice here how the theoretical insistence on postulating a right to correlate with every wrong draws one into a proliferation of rights. A commonsense inventory of rights—the things that we might reasonably demand of another person—is unlikely to include a right that others not lie in our proximity, or even more strangely, a right that others take due care in arranging privacy when they decide to promulgate lies. A first problem, therefore, is that this response seems to proliferate rights beyond the claims we would normally make of one another.

A second problem is that, assuming that there is an obligation not to spread falsehoods negligently, this obligation does not necessarily map onto the nature of the wrong committed. The wrong, I believe, would be based on the lie itself, not

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<sup>10</sup> It is noteworthy, as well, that in cases in which a third party could bring a legal suit, it would not be brought for negligence but rather under the doctrine of “transferred intent.” The thought would not be that the third party was wronged through negligence, but that the wrongful intent with regard to one person can be “transferred” to the complaining party. If I attempt to defraud a third party but end up defrauding you, then you could sue me as though I had intentionally defrauded you; you wouldn’t sue me for negligently defrauding you.

on the failure to prevent overhearing. In being called upon to justify his action, the coworker would be required to justify his lie, not his negligence. Your complaint would take the form, “Why did you lie like that?” It wouldn’t have the form, “Why didn’t you make sure that I couldn’t hear you?”<sup>11</sup> And the coworker could not defend himself by saying, “I could not have foreseen that you would overhear me,” even if that were true. In this way, the overheard lie is unlike the overheard play rehearsal. Whereas the duty to avoid foreseeably spreading false information exhausts the conduct for which the rehearsing actors can be held accountable, the coworker can be held accountable for something further—for having lied. But the obligation to tell the truth was owed to his listener, not to you.

As a related point, notice that the wrong arising from a lie need not be based on the fact that the third-party relied upon the false information. To use yet another example from Shakespeare, in *King Lear*, Cordelia is wronged by the lies that her sisters tell her father, but not because she believes them to be true. The wrong isn’t that the sisters have negligently conveyed false information to Cordelia. Rather, the wrong arises because the sisters’ wrongful actions affected Cordelia. It had nothing to do with negligence or reliance. Of course, one might think that the overheard lie is completely different. But, as mentioned above, this explanation requires thinking that the wrong isn’t actually based on the lie itself. I think this is

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<sup>11</sup> If this is not apparent, consider two points. First, notice how this response seems to condone the lie itself, as though the only objection was to the clumsiness of its execution. It is the sort of response that would make sense if you and your coworker have a shared malevolence toward the customer. Otherwise, it has the peculiarity of someone wounded as collateral complaining about cold-blooded murderer’s choice of weapon. Second, this response suggests that the complaint would be substantively different if, instead of overhearing the lie, you had been told that the bridge was fixed by the deceived customer. But the complaint against your coworker seems essentially the same in both cases: “Your lie ended up hurting me.”

a mistake. The overhearer is wronged by the lie—not by the failure to take precautions against being overheard—and Cordelia is wronged by her sisters' lies—not by their failure to insulate Cordelia from their deceit.

If one believes, nonetheless, that the wrong caused by the overheard lie ought to be explained in terms of negligence, perhaps further examples will make appeals to rights against negligence seem less tenable. Situations arise where even negligence cannot possibly explain the special position of an injured third-party. For example, suppose that a local mom-n'-pop store and Walmart are competitors in the local retail market. Both have various dealings with labor. Mom n' pop always treats labor fairly. Suppose (hypothetically) that Walmart, in contrast, exploits labor at every turn, violating labor's contractual entitlements and extracting uncompensated work as a result. By systematically violating labor's rights, Walmart is able to charge less for its goods. This competitive advantage puts the mom-n'-pop store out of business.

I think that mom n' pop may reasonably feel aggrieved by Walmart. After all, Walmart has unfairly put them out of business. But this is true even though Walmart never violates the rights of mom n' pop.<sup>12</sup> This fact cannot be chalked up to Walmart being negligent with regard to mom n' pop. The problem isn't that the injury to mom n' pop was negligently inflicted (after all, competitors can seek to put each other out of business), but that it was unfairly inflicted.<sup>13</sup>

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<sup>12</sup> Nor, as the example is constructed, does Walmart violate any public legal obligation, like a criminal law. It is not the case the Walmart acts illegally. In the example, Walmart undoubtedly acts wrongly, but it only violates the private rights of labor. For an interesting discussion of the idea that strategic marketplace behavior that harms the general public counts as a wrong to competitors, see Reed (1916).

<sup>13</sup> Contrast this with Ripstein, who emphasizes that harms resulting from economic compe-

This point—that the wrong to a third party often cannot be explained by some right that one not be negligently harmed—is particularly clear when the primary rights violation is one of negligence. Consider what is a very simple but clear example of a wrong without an underlying right: the mother who loses a child to a drunk driver. The drunk driver wrongs the child by negligently violating her right to a safe roadway. The direct rights violation here is a case of negligence. But I think any reasonable person would also say that the mother is also wronged by the drunk driver—just as Leonato is wronged in *Much Ado About Nothing*. This is not because the mother is entitled to the drunk driver’s care in whom he negligently imperils. The mother isn’t wronged because the drunk driver should have taken due care to be sure that anyone he kill not have caring family. That is, the wrong to the mother isn’t a matter of the drunk driver being negligently negligent. In short, where the primary wrongdoing is a matter of carelessness—as opposed to willfully lying or breaching a promise or whatnot—it becomes almost incoherent to explain the wrong to a third party as a matter of some additional duty of care.

Perhaps there is some other candidate right that I have not yet catalogued that might explain even these cases, but it seems to me that the exercise will only become increasingly strained. Unless one simply posits a general right that others

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tition are not wrongs because there is no right to one’s patrons. He writes, “you do me no wrong by offering a product similar to mine but at a better price, even though I lose customers” (2009, p.39). And again, “If you lure my customers away by providing a better combination of product and price, I may be much worse off. You do not wrong me, because I still have my means at my disposal...I had no right that my customers continue to patronize me. I had only a right to offer them incentives to enter into commerce with me.” (2009, p.49). Ripstein is, of course, correct that businesses do not have a right to their customers and that taking customers away does not, in itself, constitute a wrong. But it does not follow that a wrong will *never* arise where a business loses its customers.



not act wrongly—an option I will consider below—there will always be the possibility to construct an example in which acting wrongly towards one person ends up wronging some other person who did not obviously have a right concerning the conduct. The complaints that we can make on one another will outstrip the things that we are owed.

Ultimately, I think that the only way to avoid this conclusion is by insisting upon an unnaturally limited concept of wrongs and complaints—an essentially linguistic or stimulative response. In Chapter 1, I described the famous legal case of *Palsgraf v. Long Island Railroad Company*. The Long Island Railroad Company's employees negligently attempted to push a passenger onto a train, causing him to drop the package that he was carrying. The package contained fireworks, which detonated, causing a shock that knocked some scales onto a bystander, Helen Palsgraf, injuring her. Mrs. Palsgraf filed a legal suit against the railroad, alleging that it had injured her.

Intuitively, I think that Mrs. Palsgraf's complaint is perfectly coherent. We understand the thought that the company has done her a wrong; she was injured and the company is to blame for those injuries. But the New York Court of Appeals rejected her complaint as a matter of principle. The court did not question either the wrongfulness of the company's actions or the fact that they led to Mrs. Palsgraf's injuries. Instead, Cardozo explained that "[w]hat the plaintiff must show is 'a wrong' to herself, i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial."<sup>14</sup> That is, the court held that,

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<sup>14</sup> 248 N.Y. 339, 343-44 (1928).

as a conceptual matter, a person is only wronged—only has a valid complaint of his or her own—when his or her rights are violated. Because it was the passenger's rights that were violated, not Mrs. Palsgraf's, she could have no complaint.

I believe that, as a claim about our moral relationships, the central premise of the *Palsgraf* opinion, which is now canonical in Anglo-American injury law, is fundamentally mistaken. Although it is true that no right of Mrs. Palsgraf was violated, it does not follow that she was not wronged. Morally, Mrs. Palsgraf did have a valid complaint against the railroad; she was morally entitled to hold the company accountable, demand compensation, feel resentment, and so on. So, as a piece of normative reasoning, I think that the court's opinion is incorrect. The alternative is to read the opinion as a stipulation that 'wrongs' will be limited to violations of one's own rights.<sup>15</sup> What I have tried to make clear, however, is that such a stipulation flies in the face of our moral practices and experiences. The relationship with a wrongdoer in terms of complaint and holding accountable—call it what one may—is not limited to rightholders.

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<sup>15</sup> One might plausibly read *Palsgraf* as only about what counts as a 'legal wrong,' which is a term of art bearing no relationship with our moral concept. This more limited reading makes sense only if there is a reason for adopting a specialized, legal meaning of 'wrong,' divergent from our everyday moral usage. Whether such a reason exists raises questions about the purpose of tort law that are not my subject here. In part because I do not see the purposes of tort law as giving us reason for such a limited reading, I think it makes more sense to read the opinion as making a general point about the relationship between wrongs and rights—a point that might be viewed as moral as well as legal. Since many philosophers accept this conceptual claim, it seems quite plausible that the court was relying upon it.

## 4.2 WRONGS WITHOUT ANY RIGHTS VIOLATIONS

THE EXAMPLES IN THE PREVIOUS SECTION offer counterexamples to the idea that rights and wrongs are flip sides of the same coin or part of the same single package. More precisely, the examples undermine the principle that X wrongs Y only if Y has a right that X violates.

The reader will note, however, that the examples still involve some rights violation, albeit not the right of the wronged individual. In the examples, one party is injured as a result of the violation of a right of some other party. One might wonder whether this is a necessary feature of the examples. One might think that this would at least preserve the thought that X wrongs Y only if X violates *some* right. This principle might be viewed as preserving some notion that rights and wrongs are necessary correlates of one another.

I do not believe that even this weaker principle is true. In this section, I will offer some reasons for doubting it. I believe that one can wrong another person even when one does not violate any rights. But it is worth emphasizing that, strictly speaking, this claim is not necessary to my central argument. My primary point is that the two-place relations 'Y has a right against X' and 'X wrongs Y' are distinct from one another. Still, it is worth considering the relationship between wrongings and rights violations more generally.

I believe that, for X to wrong Y, is it not required that X violates any right. Rather, I think that there are examples where X wrongs Y and only something weaker is true: X acts *wrongly*. In the examples discussed already, one party acts wrongly

insofar as he or she violates the rights of another party. This wrongful action then wrongs a third party. But, at least according to most views, a person can act wrongly in ways that do not involve violating any rights. Insofar as this is true, I believe that a person can wrong another person without violating any rights.

#### 4.2.1 WRONGS FROM SELF-REGARDING DUTIES

I will begin by considering self-regarding duties. Self-regarding duties are somewhat controversial and problematic. To the extent that they exist, however, they share traits with both directed duties and with norms or imperatives that are not owed to anyone. Self-regarding duties can, therefore, be used to ease into my claim that one can wrong another person without violating any rights, precisely because they are something of a borderline case.

In certain respects, self-regarding duties resemble obligations that are owed to particular individuals correlative to rights. They seem to have a moral character, and there is an identifiable person to whom the duties are, in a sense, owed. On the other hand, it is very awkward to think that a person might have a right against himself or herself, or that, by failing in one's self-regarding duties, one is thereby violating one's own rights. This awkwardness derives in large part from the will theory's central thought that one person's having a right involves control over another person who is bound by a duty. It does not seem possible that one person could be both the holder of control and the one bound, simultaneously. As Hart puts it, "it appears absurd to speak of having duties or owing obligations to ourselves—of course, we may have 'duties' not to do harm to ourselves, but what could be

meant ...by insisting that we have duties or obligations *to* ourselves not to do harm to ourselves?” (1955, pp.181-82). Because duties regarding the self have both these characteristics, their disregard can naturally be described as acting wrongly, but not violating any rights.

I want to suggest that, in violating self-regarding duties, one can wrong others. When we do not do what we ought with ourselves, we may wrong those who have a stake in our lives. To take the most extreme example, it is natural to think that suicide wrongs loved ones (at least, absent some justification like terminal illness). For example, I think that a mother might be wronged by a daughter who commits suicide, much like she might be wronged by the drunk driver who hits her daughter. In both cases, the mother’s loss is the result of someone acting wrongly. But, even though she may act wrongly, we would not generally say that the daughter violates anyone’s rights by committing suicide.

The obligation not to commit suicide is something of a peculiar self-regarding duty. The more common examples involve our obligations to better ourselves and not to waste our lives and talents. Failure to respect these obligations also can be the basis for wronging others, I think. A classic illustration of this phenomenon is the biblical parable of the prodigal son. After squandering his share of the family wealth, the son returns to his father and says, “Father, I have sinned against heaven and against you” (*Luke 15:21*). The father famously forgives and welcomes the son back. The story is intelligible because we can understand the father as wronged by the son’s actions. If we could not, then the son’s declaration that he has sinned *against* his father, his contrition directed toward his father, and the father’s forgiv-

ing the son would not make sense.

Although the prodigal son wrongs his father, it would be quite odd to say that this is because he violates anyone's rights. As already noted, we do not normally think that self-regarding duties correlate with rights against ourselves. Nor, I think, has he violated a right of his father. Parents undoubtedly have a massive interest in their children making the most of their lives, but it is not the basis for a right that parents have against their children. But, by not making the most of himself, the son has failed those who care about him and who have an interest in his thriving.

It is easy to see this structure replicated in a range of contexts, which is why it makes for a good parable. One might feel that one has wronged a spouse by failing at work. For example, in *Bleak House*, Richard, unable to apply himself professionally with any consistency, remarks about his fiancée: "I love her most devotedly; and yet I do her wrong, in doing myself wrong, every day and hour" (1853, p.228). One might similarly feel that, through one's personal failings, one also fails one's child. Not making the most of one's talents might even be thought to wrong a friend. For example, in the film *Good Will Hunting*, Chuckie complains to Will that he will wrong their friends if he doesn't put his talents to use: "[Y]ou, you're sittin' on a winning lottery ticket and you're too much of a pussy to cash it in ... It'd be a fuckin' insult to us if you're still here in twenty years." What examples like this suggest is that we may be liable to the complaints of those around us if we don't do what we owe ourselves.

I don't think that the examples need to be among family or friends, nor must they be terribly serious. Just recently, I encountered two newspaper articles about

adults apologizing long after the fact to former teachers for their failures. In April 2012, there was a story about a man who had sought out his seventh-grade teacher to apologize thirty-nine years later for abruptly abandoning his class.<sup>16</sup> In October 2012, British Education Secretary Michael Gove wrote a letter apologizing to his grammar school French teacher, stating “Because we misbehaved, we missed out... And for that you deserve my apology.”<sup>17</sup> Just about anyone can imagine expressing a similar sentiment to a former teacher. We have the sense that, in not taking advantage of our opportunities, we may do an injustice to the teacher or mentor who puts energy or faith into our self-improvement. One would hardly say, however, that teachers have a right to their students’ best efforts.

Of course, the suicidal daughter or the prodigal son will be clearer examples for a skeptical reader. They present most pointedly the idea that, assuming there are self-regarding duties, one can wrong others by violating those duties. But I mention other, fuzzier examples because I think there is value in recognizing the range of cases. In a whole variety of ways, we may have a stake in what other people do to themselves, not only to ourselves or to others.

#### 4.2.2 WRONGS FROM RELIANCE

In fact, we may simply have a stake in what other people do. We acquire a stake because, in the course of living our lives, our interests are apt to become intertwined with the actions of other people. This can happen in deliberate and overt ways,

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<sup>16</sup> Tom Hallman, Jr., “A teacher, a student and a 39-year-long lesson in forgiveness,” *The Oregonian*, April 21, 2012.

<sup>17</sup> See, e.g., Sarah Harris, “I’m sorry, Sir! 30 years on, Gove apologises to French teacher for his ‘clever-dick’ questions,” *The Daily Mail*, Oct. 22, 2012.

as when one chooses to have a child. Or, probably more often, it can happen organically, as some relationship or interdependence evolves between people. In particular, one may come to rely on the expectation that another person will conform to certain norms of conduct. When that person defies our expectations by doing something that he or she ought not do, we may have a complaint against him or her.

This proposition is at odds with the common thought that, as long as we don't violate anyone's rights, no one can have any complaint against us. This thought is generally premised on the idea that another person's mere reliance on us—that we may do someone harm—is not itself morally significant. Ripstein offers the following example to illustrate this second idea:

Suppose that you and I are neighbors. You have a dilapidated garage on your land where our properties meet. I grow porcini mushrooms in the shadow of your garage. If you take down your garage, thereby depriving me of shade, you harm me, but you do not wrong me in the sense that is of interest to us here. Although you perform an affirmative act that worsens my situation—exposure to light destroys my mushrooms—I do not have a right, as against you, that what I have remains in a particular condition. (2009, pp.77-78)<sup>18</sup>

As Ripstein sets up the example, I would agree that the neighbor does not seem to be wronged. But, in this example, the neighbor does not seem to have acted wrongly—he is merely disposing of what is implicitly a rubbish heap of a building. While I agree with Ripstein that harm cannot produce a wrong on its own, I think

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<sup>18</sup> Like the harmless trespass, this is a structure of example that Ripstein deploys at a number of points. “You can cut down your own trees, depriving me of shade that I value, but you cannot cut down trees on my land” (2009, p.242).



that harm *that is the result of a wrongful act* can be the basis for a wrong.

If we modify Ripstein's example such that tearing down the garage involves acting wrongly, then I think that it will start to look more like a wrong to the mushroom farmer. Suppose that the garage was a historic landmark such that the owner was not permitted to tear it down without a permit and that part of the reason why the mushroom farmer made the costly investment in growing porcinis in that spot was based on the reasonable assumption that the historic preservation laws would likely leave the garage there forever. Or suppose that the owner simply hates the fact that the mushroom farmer's heifers always take the blue ribbon at the county fair, and the owner tears down the garage only as a vindictive retaliation against the mushroom farmer. Or imagine that the rustic old garage is being torn down to make room for an appalling gaudy glass gazebo that will offend all aesthetic sensibility in the rural Vermont shire where this drama is set. It seems to me that in cases like these, the mushroom farmer may very well be wronged.<sup>19</sup>

What is required, I think, is merely that there is a decisive reason for the neighbor not to tear down the garage, such that he would act *wrongly* if he does tear it down. The reason could be rights-based. For example, the neighbor might have entered a conservation agreement with the local land trust. But, as the previous paragraph was meant to show, there could be other reasons that have little to do with anyone's rights. They could be legal, aesthetic, religious, or perhaps even prudential.

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<sup>19</sup> It seems to me that knowledge of the reliance is not even necessary in these cases. Knowledge of reliance can supply the reason why someone should not alter their conduct without good reason, but there can be other reasons why someone acts wrongly.

Some moral philosophers will find these claims counterintuitive. But I would venture that a substantial share of the wrongs and complaints in everyday life arise not out of rights violations but rather out of mistaken reliance, failed coordination, and unmet expectations. In such circumstances, the complaint isn't grounded on any thought that a claim of ours has been violated, but simply on the thought that we are the unfortunate victim of another person's error or malfeasance.

One context where this occurs is love. In Chapter 1, I mentioned that the reader of *Anna Karenina* may have the sense that Kitty wrongs Levin by turning her affections to a less worthy suitor, although no one would suggest that Levin had a right to her. Or, consider the following passage from Anthony Trollope's novel *The Eustace Diamonds*:

Frank Greystock was not her lover. Ah,—there was the worst of it all! She had given her heart and had got nothing in return... Then she remembered certain scenes at the deanery, words that had been spoken, looks that had been turned upon her, a pressure of the hand late at night, a little whisper, a ribbon that had been begged, a flower that had been given;—and once, once—; then there came a burning blush upon her cheek that there should have been so much, and yet so little that was of avail. She had no right to say to any one that the man was her lover. She had no right to assure herself that he was her lover. But she knew that some wrong was done her in that he was not her lover. (1872, p.73)

Lucy Morris, the girl described, does not view her self as having a claim on Frank's love—it is essential to the story that they are decidedly not engaged or anything. And yet she feels that there has been so much between them that he should be committed to her. He is making a mistake and letting her down.

Once one opens one's mind to it, there are a wide variety of instances where we consider ourselves aggrieved because we are let down. That is, we are aggrieved by actions that are admittedly not within our sphere of control. Bob Dylan's fans felt betrayed when he suddenly went electric. New Yorkers felt wronged by owner Walter O'Malley's moving the Brooklyn Dodgers to Los Angeles. Cleveland fans felt aggrieved by LeBron James's gaudy decision to sign with the Miami Heat. Now I don't think that any of these folks would have, except in the most heated moment, insisted that they had any authority or right over what was done—that Dylan or O'Malley or James should have gotten their authorization. And yet they would have insisted that they—along with other music fans or New Yorkers or Cavs fans—have serious grounds for complaint and resentment.

Of course, fans can be fanatical, so we may find these sentiments somewhat over-the-top. But I don't think that we should consider them incoherent. They are examples of the fact that, when we have a stake in the action of another and when we perceive that person to have acted wrongly, we consider ourselves aggrieved. We are a participant, not just an observer, in the human drama; and our harm isn't the result of some natural event, but the result of a criticizable human action. This creates a morally significant relationship between one who has been injured and one who is accountable. Whenever we act wrongly, it has the potential to create such a relationship because people so often have a stake in each other's lives.

### 4.3 THE OUTWARD RIPPLE OF BAD ACTS

THIS VIEW OF WRONGS may seem to open us to absurdly expansive liability for our bad actions. One may worry that the view that I have been defending—that one can wrong third parties to whom one did not directly owe a duty—would be too onerous. If someone’s immoral but relatively benign act winds up causing a raft of injuries to wholly unforeseen third parties, it sounds as though that person would be on the hook for a raft of unanticipated moral complaints. From what I’ve said, a single lie or misstep might mean that one has wronged some distant stranger. Surely, the boy who nicks an apple from the farm stand doesn’t wrong every person at the market who is struck by an errant apple if the stand collapses. And, surely, we wouldn’t say that he has murdered the bystander who suffers a brain aneurism after a blow from a granny smith. The thought that we can wrong third parties who are not rightholders would seem to lead to an absurd moral landscape.

Absurd or not, I believe that this is basically our moral reality—with one important qualification. The qualification is that there must be some appropriate notion of proximate cause. I am not morally liable for absolutely anything that would not have happened *but for* my bad act. The causation must be appropriately ‘strong.’ How to draw this line is a complex problem that any view about attribution and accountability must answer. It is not made less problematic by insisting on a correlation between rights and wrongs.<sup>20</sup> I will not attempt to tackle it here.

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<sup>20</sup> Even if wrongs require a rights violation, there will still be the question of what sort of causal connections count as violating a right. You have a right against being injured by my negligent driving. But suppose that my negligent driving causes me to strike a tree, which falls over causing an air current, which effects weather patterns, causing you to slip on some black ice hours later. I

Assuming, however, that they are the result of a recognizable chain of cause-and-effect, I believe that we are accountable for all consequences of our immoral actions. Unforeseen wrongs to third parties are a critical and familiar attribute of our moral experience. Consider an example from Robert Penn Warren's novel, *All The King's Men*. One of the novel's subplots involves an upstanding character named Cass Mastern, whose one bad act consists of having an affair with his friend's wife, Annabelle Trice. Upon discovering the affair, Mr. Trice removes his wedding ring and shoots himself. A trusted family slave named Phebe finds the ring and gives it to Annabelle. Annabelle is unable to bear Phebe's knowledge of the circumstances behind her husband's death, and she sells Phebe into the appalling slave trade of the antebellum South. Mastern is deeply altered by learning what has happened. He describes:

At that moment of perturbation, when the cold sweat broke on my brow, I did not frame any sentence distinctly to my mind. But I have looked back and wrestled to know the truth... It was... the fact that all of these things—the death of my friend, the betrayal of Phebe, the suffering and rage and great change of the woman I had loved—all had come from my single act of sin and perfidy, as the boughs from the bole and the leaves from the bough. Or to figure the matter differently, it was as though the vibration set up in the whole fabric of the world by my act had spread infinitely and with ever-increasing power and no man could know the end. I did not put it into words in such fashion, but I stood there shaken by a tempest of feeling. (1946,

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have done what I owed you a duty not to do—namely drive negligently—and harm has befallen you as a result. But one wouldn't want to say that this counts as a wronging.

There is, however, a sense in which linking wronging with rights might help arrive at a concept of proximate cause. This is because one might think that one only proximately causes those injuries that result to those interests the right is designed to protect. This presupposes some version on the interest theory of rights, however, and brings with it all the problems discussed in Chapter 2.

This idea—that the moral significance of our failings ripple outward in unforeseeable ways—is an important theme in the novel. In fact, one might say that it is an important theme in all tragedy. Aristotle describes the tragic hero as “a person who is not superior in virtue and justice who passes into ill fortune, not because he is bad and vicious, but because he makes some error” (1995, 1453a:8-11). Tragedy relies on our understanding that one error or flaw can have grave ramifications for our fortunes, both material and moral. It may be tragic but it is not absurd that one immoral act can mean that we have wronged unforeseen others. Although Cass Mastern could never have foreseen the effect that his act would have on the slave, he devotes himself, unsuccessfully, to finding Phebe and saving her from the whorehouses. This is intelligible as an attempted act of repair. The two become united in a relationship of one who has wronged and one who is wronged.

I want to make clear one thing that I am not saying here. One might read the above-quoted passage from *All The King's Men* as merely describing the cliché idea that all things are interrelated in unimaginable ways—the proverbial butterfly flapping its wings. This is not my point, nor, I think, is it Robert Penn Warren's. Rather, the point is uniquely about *bad* acts—that badness seems to spread in a special kind of way. The butterfly that innocently flaps its wings isn't morally accountable for the hurricane, but Cass Mastern is accountable, in some morally significant sense, for the evils that result from his “single act of sin and perfidy.” Wrongness spreads in a unique way. It is only when we commit a bad act that we are morally liable for whatever follows.

Philosophers and legal scholars have occasionally noticed—often with some discomfort—that there is something expansive about the way in which bad consequences can be imputed to bad actions. In his dissent in the *Palsgraf* case, Judge Andrews argues that there can be liability for injuries to unforeseen plaintiffs. He writes, “It may be said this is unjust. Why? In fairness [the negligent person] should make good every injury flowing from his negligence. Not because of tenderness toward him we say he need not answer for all that follows his wrong.”<sup>21</sup> Similarly, Elizabeth Anscombe forcefully rejects the idea that “you can exculpate yourself from the *actual* consequences of the most disgraceful actions, so long as you can make out a case for not having foreseen them.” Instead, she claims that “a man is responsible for [all] the bad consequences of his bad actions” (1958, p.12). Anscombe’s point is that our moral responsibility for our bad actions is not limited to the intended or the foreseen consequences or victims. When we act badly, we subject ourselves to moral criticism for the results regardless of what we anticipated *ex ante*.

This phenomenon of broad accountability for the bad consequences of our bad actions receives particularly clear notice in Kant’s ethics. At the beginning of *The Metaphysics of Morals*, Kant writes: “The good or bad results of an action that is owed...cannot be imputed to the subject. [T]he bad results of a wrongful action...can be imputed to the subject” (1965, 6:228). According to Kant, when we act wrongfully, we are accountable for whatever evil results.<sup>22</sup>

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<sup>21</sup> 248 N.Y. 339, 355 (1928) (Andrews, J., dissenting).

<sup>22</sup> Note that Kant says only that one is accountable for the bad consequences of wrongful acts. I think that this asymmetric treatment of good and bad consequences causes problems for one natural way to interpret Kant’s views here. One might defend Kant’s view in the following

This principle is at work in Kant's much-maligned essay "On a Supposed Right to Lie Because of Philanthropic Concerns." Kant argues that if one tells a lie, even to a murderer at the door, one is responsible for the resulting evil consequences, no matter how unforeseen. He writes,

[I]f by telling a lie you have in fact hindered someone who was even now planning a murder, then you are legally responsible for all the consequences that might result therefrom. But if you have adhered strictly to the truth, then public justice cannot lay a hand on you, whatever the unforeseen consequence might be. It is indeed possible that after you have honestly answered 'Yes' to the murderer's question as to whether the intended victim is in the house, the latter went out unobserved and thus eluded the murderer, so that the deed would not have come about. However, if you told a lie and said that the intended victim was not in the house, and he has actually (though unbeknownst to you) gone out, with the result that by so doing he has been met by the murderer and thus the deed has been perpetrated, then in this case you may be justly accused as having caused his death. For if you had told the truth as best you knew it, then the murderer might perhaps have been caught by neighbors who came running while he was searching the house for his intended victim, and thus the deed might have been prevented. Therefore, whoever tells a lie, regardless of how good his intentions may be, must answer for the consequences resulting therefrom even before a civil tribunal and must pay the penalty for them, regardless of how unforeseen those consequences may be. (1993, p.65)

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way: When you follow your duty, then what you did was not really up to you. As a result, it is only when you do not follow your duty that we can think of you as the "the author" of what happens. The point would be, in a sense, strictly metaphysical. But if this were correct, then all of the results—good and bad—of an agent breaking a duty should be imputed to that agent. If the point is only about metaphysical attribution, then the good consequences of breaking a duty should equally be attributed to the agent. For this reason, I think that the thesis should be viewed as making a point about morality. That the point, and the subsequent discussions among commentators, is framed in terms of "imputation," which suggests the metaphysical idea, seems to me to be unfortunate. For further discussions of how Kant ought to be interpreted, see Hill (2000, Ch.6); Timmermann (2008); Reath (2006, Ch.9).



Kant is essentially saying that, if you lie, you are on the hook for any bad consequences that come about, but if you tell the truth, then you will not wrong anyone.

Now I don't want to defend Kant's first-order claim about whether lying would be wrong in this case—you should probably lie to the murderer at the door and you may even owe it to your friend to do so. But I do want to defend Kant's view about accountability—namely, that one is accountable for even the unforeseen bad consequences that result from acting wrongly.<sup>23</sup> The murderer-at-the-door example has a substantial similarity to some of the examples I have offered. In particular, in the bridge example, I argued that the coworker is morally liable for the bad consequences that his lie produces, even the unforeseen consequences to a third party. And what I want to suggest here is that we can see the plausibility of Kant's claim by altering the murderer example.

In Kant's example, you know that the murderer is a murderer, and he has no right to be told the truth. But suppose that you don't know that he is a murderer. And, to make the point even clearer, suppose that you have a strong reason to believe that he does have a right to be given a truthful answer—imagine that he is your friend's boyfriend, or a police officer carrying a warrant. You nevertheless lie in violation of this right—perhaps because you don't like the boyfriend, or because you are concerned that the cop might find the dimebag of pot that you have in your pocket. Now suppose that Kant's imagined chain of events comes to pass: your friend has, unbeknownst to you, snuck out to avoid the murderer and, on account

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<sup>23</sup> Others have defended Kant on this point as well. See, e.g., Schwarz (1970). Christine Korsgaard notes, "The advantage of the Kantian approach is the definite sphere of responsibility. Your share of the responsibility for the way the world is is well-defined and limited, and if you act as you ought, bad consequences are not your responsibility." (1996, p.150).

of your lie, befalls precisely the fate that she had sought to evade.

In this situation, I think Kant would be right; you would have wronged your friend by virtue of your lie. Only a strangely callous person would not feel partly at fault for what has transpired. Supposing your friend survived, she might reasonably ask, “What the hell were you doing?” In Kant’s words, you would have to “answer for the consequences” of your action. To say this isn’t to deny that the murderer commits a wrong. Wronging isn’t zero sum, and the same injury can be the basis for more or fewer wrongings. In this case, your friend is wronged by the murderer *and also* by your wrongful act of lying. But the fact that she would be wronged by your lie is just another illustration of the way that one’s accountability for a wrongful act can permeate outward in unforeseen ways.

#### 4.4 THE RIGHTS OF HUMANITY AT LARGE

THE DIFFERENCE BETWEEN the original and my variation of the murderer-at-the-door examples is that, in the variation, telling the lie constitutes acting wrongly. This is true *ex hypothesi* because of the stipulation that you believe the person at the door to have the right to a truthful answer. In the original example, in contrast, telling the lie is almost certainly the right thing to do. This is true, I will venture, at least in part because the murderer does not have the right to a truthful answer.

But Kant acknowledges that the murderer has no right to a truthful answer, and yet he denies that telling the lie is permissible. He explains, “even though by telling an untruth I do no wrong to him who unjustly compels me to make a statement, yet by this falsification, which can be called a lie (though not in a juridical sense),

I do wrong to duty in general in a most essential point” (1993, p.64). It is precisely this thought—that the lie is still wrong regardless of the rights of the murderer—combined with the premises that one is responsible for the bad consequences of one’s bad acts, that yields Kant’s conclusion that you would wrong your friend if the lie backfires. As I have already made clear, I think that the premise concerning responsibility for bad consequences is correct. I believe that Kant’s error is thinking that the lie would be wrong regardless of the fact that the murderer has no right to a truthful answer.

So why think this? Kant’s thought is that truthfulness is a duty owed to humanity at large. He writes, “Truthfulness in statements that cannot be avoided is the formal duty of man to everyone, however great the disadvantage that may arise therefrom for him or for any other” (1993, p.64). And later, “For a lie always harms another; if not some other human being, then it nevertheless does harm to humanity in general, inasmuch as it vitiates the very source of right.” He describes the lie as “a wrong done to mankind in general” (1993, pp.64-65). Thus, even if we do not have a duty owed to the murderer to be truthful, we have a duty owed to humanity in general.

In his *Palsgraf* dissent, Judge Andrews makes similar statements about the duties of care that are violated when we are negligent. He says that a lack of care is “a wrong not only to those who happen to be within the radius of danger but to all who might have been there—a wrong to the public at large.”<sup>24</sup> He goes on to suggest that the duty is owed to everyone. He says, “Due care is a duty imposed on

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<sup>24</sup> 248 N.Y. 339, 349 (1928) (Andrews, J., dissenting).

each one of us to protect society from unnecessary danger, not to protect A, B or C alone... Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.”<sup>25</sup> This understanding of duty allows Andrews to view Mrs. Palsgraf’s complaint as “original and primary” concerning “a breach of duty to herself,” and not merely one “subrogated to any right of action of the owner of the parcel.” Andrews thus preserves the idea that a plaintiff must have been owed a duty by arguing that the duty not to be negligent is owed to everyone.

This thesis—that our duties are owed to humanity at large—has the potential to restore the correlation between rights and wrongings. This approach concedes that sometimes individuals are wronged even without having a right that is uniquely their own violated. It also concedes that injured third parties have no more claim-rights than bystanders—they are just like anyone else. What it adds is that anyone—by virtue of belonging to the moral community—has a claim against anyone else not to act wrongly. Thus, the wrong done to third parties may be explained in terms of the violation of an outstanding right that people behave morally. Mrs. Palsgraf, the mother who does not receive the care promised to her son, the coworker who overhears the lie, the mom ’n pop store that’s driven out of business, the slave Phebe, and the friend who runs into the murderer as she tries to slip out the back—all of them do in fact have a right that is violated, namely, the right of all humanity that others act according to their duties.

It is important to distinguish between two versions of the idea that duties are

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<sup>25</sup> *Id.* at 350.

owed to humanity at large. According to the first version, duties are owed to everyone *as opposed to anyone in particular*. This is essentially Andrews's conception of negligence. Care isn't owed to anyone in particular, but instead to society at large. Thus, Andrews contrasts negligence with violations of duties owed only to certain people, such as duties to invitees onto a property or to the farmers protected by an ordinance. This way of thinking of a duty as owed to humanity at large essentially involves denying that the duty has 'relational' or 'bipolar' character. While it is plausible that some obligations lack this character—what Andrews believes regarding the duties of due care—it is substantially less plausible to say that all duties are owed to the world at large in this way. To think that all duties are owed to humanity at large in this sense would be to deny that there are duties *owed to individuals*. It would entirely deny the relational character of obligation.

There is, however, a second version of the idea that duties are owed to humanity at large, which I will call *the moral pact thesis*. The idea behind the moral pact thesis is that, in addition to owing duties to primary rightholders, each person also owes it to everyone else not to act wrongly. We owe it to everyone else to act morally because morality is, roughly speaking, a pact between all members of the moral community. Thus, when I act contrary to duty, I violate a social compact at the same time. By way of analogy, it is a bit like the student who agrees to an honor code: when he cheats, he not only violates his obligation not to cheat but also breaks his word and wrongs the school community. This thesis would explain the cases of third-party wronging while retaining the correlation thesis's insistence that all wrongs have a correlated right. The correlated right in these cases is the

right of all persons to expect that others will conform to morality.

There is something correct in the spirit of this response. What makes the third-party wronging cases plausible is that, although the third parties are not the primary rightholders, acting morally seems to be something, in some sense, *owed to everyone*. Although I partly agree with its sentiment, I think that the moral pact thesis is incorrect.

The first hint of difficulty for the moral pact thesis is evident in the murderer-at-the-door example itself. As I've noted, Kant believed that you owe a duty to humanity in general even though you do not owe a duty to the murderer. This seems to produce the wrong results. The reason it produces the wrong results, I want to suggest, is that your obligation actually is dependent on the right of the murderer. If someone has a right to a truthful answer, then you have a duty to give one. And if he has no such right, then you have no such duty. This is what we mean when we say that the obligation is *owed to* that person. But Kant's thesis partially severs this dependence. It turns out that we still have the duty, even if the other person has no right, because humanity has a right.

This is the basic problem for the moral pact thesis: it is hard to understand how the duty could be owed to the individual person and yet also to humanity in general. A Kantian, I suspect, would say something like, "it is owed to humanity in the particular other person," but I don't entirely see what that could mean. Is my duty animated by the right of a particular person or by the compact with humanity generally? My sense is that for rights to be meaningful, then the correlative duties must be animated by the particular person, and thus the supposed compact among

everyone is playing an ancillary purpose at best.

There is a parallel here to the agreement to abide by an honor code. The College of William and Mary's honor code, the oldest in the nation, states, "I pledge on my honor not to lie, cheat, or steal, either in my academic or personal life." The famous Brigham Young University honor code leads off with "Be Honest." In terms of shaping what one should and shouldn't do, this is pointlessly redundant. The student agrees not to lie, which is something he already had a duty not to do. In this regard, the honor code doesn't really create any additional rights or duties. The agreement doesn't create a new additional right against being lied to or cheated.<sup>26</sup>

For parallel reasons, I want to suggest that the moral pact thesis is false insofar as it purports to create an additional right of all to the moral conduct of each. I mean to describe three interrelated ways to see this. First, there is what I will call the doubling problem. The problem is that the moral pact seems to add a second duty on top of the primary duty, which is at best redundant and more likely misleading.

To see the point, consider an example. Imagine that you promise me that you will return my bike by Wednesday, and then you don't. I had been planning to take my bike over to visit my friend Sylvia and help her with some burdensome physical labor she was planning for Wednesday. I explain to Sylvia that I had been planning to help her, but that I couldn't make it as a result of your noncompliance. Sylvia does all the work herself. If my argument regarding third parties is correct, then you have wronged Sylvia. She might complain to you about your breached

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<sup>26</sup> If a would-be murderer knocks on a BYU door, he could not say, "I know that I wouldn't normally have a right to be given a truthful answer, but as a fellow member of the honor code, you have promised not to lie to me."

promise, and you might plausibly apologize and offer your own physical labor in the future as compensation.

The moral pact thesis would explain the way in which you wrong Sylvia in terms of you and her sharing an agreement to act morally which you do not follow in breaking your promise to me. So far, so good. The problem arises in that you also share this moral pact with me. If there is any pact saying, “one should keep one’s promises,” then surely I’m a party to it as well. So now you have broken two agreements between you and me—one being the promise itself, the other being the moral compact. But this seems bizarrely redundant. This is especially so when we put it in terms of rights. The moral pact thesis seems committed to the idea that Sylvia has a right that I keep my promise. But whatever right she has, I surely have also. And this is entirely independent of my status as the primary rightholder.

The redundancy becomes downright pernicious if the two rights are thought to be capable of coming apart. This is, I think, what really goes wrong in Kant’s discussion of the murderer at the door. Kant seems to think that the murderer has no right to be given a truthful answer and yet that the right of humanity in general persists. This is what grounds Kant’s rigid insistence that one tell the truth, even to the murderer. But wouldn’t the murderer himself, as a fellow member of humanity, also be wronged by your breach of the moral pact? Surely this is not correct. Whatever duty is owed to humanity in general must be parallel with—and parasitic on—a duty to the particular individual. But if the rights aren’t capable of coming apart—if I have the general right always and only when I have the more particular right—then it makes the redundancy all the more pronounced. My



right seems to consist entirely in the particular duty you owe me as promisee; the rest is superfluous.

A second problem concerns the applicability of claiming or demanding. Ordinarily, when you and I have an agreement that you will perform certain actions, then I have a claim that exists prior to your performance. This gives me a certain standing and makes possible certain practices—e.g., I can demand that my claim be enforced, excuse you from your duty, transfer my claim on you to someone else, and so on. The moral pact thesis mistakenly grants this standing to third parties. If, as the moral pact thesis would have it, everyone has essentially contracted with each other to abide by morality, then this should entitle everyone to make the claims and demands that are typical of rightholders.<sup>27</sup> Consider the example above—Sylvia is wronged by your noncompliance with the promise made to me. It would be odd, however, to think that Sylvia had any standing to demand or claim your compliance *beforehand*. But the moral pact thesis implies otherwise: you are entered into a pact with Sylvia that requires you to act morally, and she could thus demand your compliance. She could have pointed out that she stood to be potentially harmed by a failure to perform, but this is not the same thing as demanding performance because you could prevent the harm in ways other than by fulfilling the promise. But if Sylvia personally demanded that you keep your promise, she would seem to arrogate to herself powers that she does not have—as though she

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<sup>27</sup> In fact, one might see this as one of the important features of honor codes: they entitle each student individually to demand compliance from every other student. I'm not sure that I believe this to be the case. Even where there is an honor code, individually policing the conduct of others seems beyond one's rights. A student cannot really say to another, "you made a promise *to me* that you would be academically honest." The promise was made to the community at large, and thus only the community at large can demand compliance.

were entitled to morally police your conduct.<sup>28</sup>

This problem blends with a third problem concerning remote third parties. Humanity is a large universe of people. The agreement that is posited between you and Sylvia by the moral pact thesis would also be shared between you and those not affected by your promise at all. As a result, the view under consideration would have to maintain that you wrong David Beckham *in the same way* that you wrong Sylvia. Beckham would have the same basic complaint. Coupled with the previous problem, it would seem that Beckham would have a claim that you keep your promise even though he has no real stake in the matter (and doesn't even know who you or I or Sylvia is). One could insist on saying that, but it would make having a claim seem rather trivial. Insofar as the moral pact thesis is overly generous in doling out rights claims, it ends up demeaning their importance. What we would like is an explanation of how persons affected by wrongdoing are not mere bystanders. The moral pact thesis does not offer an answer to that.

As a result, I see no reason to think that each of us has a right against every other person that he or she behave morally, and I reject the idea that the correlation between rights and wrongs can be maintained in this way.

We can, however, distinguish a different, third sense in which morality is owed to humanity in general. The honor code analogy is again helpful here. If we think of an honor code as a source of rights and duties, then I think it is largely a fruitless exercise. The duty to be honest and not lie exists independently of the honor code,

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<sup>28</sup> It might be thought that the problem here would be that Sylvia is assuming individually the role of promisee when really that is the role of the moral community in general. But if this is right, if the moral pact isn't between individuals personally, then it's not clear how it could underwrite the thought that third parties can be wronged, individually, by immoral acts.

and the code probably adds nothing. On the other hand, the honor code serves an important purpose in formalizing the idea that the entire academic community has a stake in these duties. It expresses the idea that everyone stands to be potentially wronged by a violation.<sup>29</sup> This would be true regardless, I think, but the honor code serves a symbolic purpose in making clear that certain censure from the community can be expected upon breach of one's duties.

Plutarch attributes to Solon, the great lawgiver, the following description of what city is best to live in: "That city in which those who are not wronged, no less than those who are wronged, exert themselves to punish the wrongdoers" (1914, p.455). The honor code, in a sense, does precisely this. It is a recognition that each person is potentially accountable to everyone for any bad act.

This constitutes a sense in which our moral duties are owed to everyone: everyone is potentially among those who could be wronged by violating them. This fact—that everyone is potentially among those wronged—is a corollary of the principle that one's accountability for an immoral action can spread indefinitely and unpredictably. And, in this sense, it is true that we owe our moral duties to everyone. But this sense of being owed a duty isn't the sense in which a rightholder is owed a duty. One could, of course, say that everybody has a right, but this would be merely linguistic, a placeholder for the idea that everybody potentially stands to be wronged. I believe that being a rightholder amounts to more than this.

To maintain this view, we must accept that rights and wrongings will come apart.

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<sup>29</sup> Assuming, that is, that the honor code is viewed as a mutual agreement by members of the community with one another. In the film *The Social Network*, Larry Summers glibly rejects this interpretation, stating "You enter into a code of ethics with the university, not with each other."

They will come apart because the violation of a right can spread its consequences to third parties who will then be wronged by that violation. And thus there will be two distinct ways we can morally relate to each other: as one who *ex ante* has a right that another perform (or refrain from performing) an action and as one who *ex post* is wronged by another's action (or inaction).

*You shall not wrong one another.*

Leviticus 25:17

*Do not wrong anyone (neminem laede) even if, to avoid doing so, you should have to stop associating with others and shun all society.*

Kant

*Do not commit a wrong now through the ignorance and thoughtlessness of youth that will gnaw at you for the rest of your life through the remorse of conscience and the bitter pangs that pleasure leaves behind in our minds as it flees from sight.*

Erasmus

# 5

## An Argument from Normativity

IT IS A FAMILIAR THOUGHT that one ought not commit a wrong against another person. This thought can easily be taken to imply that, when an action (or omission) would wrong another person, that fact counts as a reason—perhaps even a decisive reason—against the action (or omission). In this way, it is easy to think that the fact that something would constitute a wrong against another person can

explain why one ought not do it.

For some philosophers, in fact, this thought goes to the essence of morality. Schopenhauer, for example, believed that we come to experience morality by experiencing what it is to wrong another person, extending our will so far that it interferes with the other person's. "[T]he concept of wrong is the original and positive, and the concept of right, which is opposed to it, is the derivative and negative" (1907, p.437). On a slightly different note, Elizabeth Anscombe suggests that wronging can explain the wrongness of some actions: "What is wrong about an act that is wrong may be just this, that it is *a* wrong" (1990, p.152.). More recently, Stephen Darwall has argued that, when we appreciate how an action would open us to the moral complaint of another person, we appreciate the moral reasons against that action. He writes, "When... a free and rational deliberating agent acknowledges she would be to blame for doing something, she thereby acknowledges conclusive reasons not to do it and, in a sense, holds herself accountable. This picture links accountability centrally to the reasons free and rational being have for living by the moral law" (2009, p.113). These philosophers represent the appeal of thinking that the fact that an action would wrong another—that it would give another grounds to complain or hold one accountable—is an important aspect or description of why one ought not perform that action.<sup>1</sup>

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<sup>1</sup> Although not committed to precisely this view, contractualism involves a quite similar thought. Its core intuition is that we have a reason not to perform acts that cannot be justified to others, i.e., that others could complain against. For example, Scanlon writes, "When I reflect on the reasons that the wrongness of an action seems to supply not to do it, the best description of this reason I can come up with has to do with the relation to others that such acts would put me in: the sense that others could reasonably object to what I do." (1998, p.155). One might read this as saying that many of our obligations (what we owe to each other) spring from the fact that to do otherwise would wrong someone.

In this chapter, I argue that this is incorrect. More particularly, I argue that the fact that an action will constitute a wrong to another provides little or no reason against that action. Avoiding wronging is not, I think, generally something of normative significance. Put another way, wronging does not give rise to wrongness.<sup>2</sup>

This thesis should not be taken as some sort of radical moral skepticism. My aim is to argue that it is the rights of others, not the wrongs that we might do them, that have normative significance. That we owe a duty to another is a reason—is often a decisive reason—to perform an action. But this reason, I will argue, is neither provided by nor equivalent to the fact that another would be wronged. If this is correct, it reveals an important way in which rights and complaints are distinct—rights are normative in a way that complaints are not.

It is worth pausing over what would be meant by the thought that potential wrongings are normatively significant—that is, it is worth clarifying the motivation behind the view that I mean to oppose. I suggested in the previous paragraph that doing one's duty—as opposed to avoiding wronging anyone—is what is of normative significance. The former provides reasons, not the latter. One might be tempted, however, to say that I am drawing a distinction where there is none to be drawn. Fulfilling one's duty to X and avoiding wronging X aren't two separate

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<sup>2</sup> Just to be clear, my interest is in the phenomenon of *wronging* others, not merely acting *wrongly*. When one does something that one ought not do, we might say that one acts *wrongly*. To act *wrongly* is, in this sense, to transgress against duty generally. But when we act in such a way that a particular other person is entitled to complain against our action, then we have *wronged* that other person. To have *wronged* another, in this sense, is not merely to transgress against duty generally, but to transgress against a particular person. In short, acting *wrongly* involves only one person, whereas *wronging* requires two parties. These concepts are obviously related—when we commit a wrong against another, we will generally have also acted *wrongly*. But for the purposes of my argument, my focus will be on *wronging*. My argument is that potential wrongings are not normatively significant.

things, but the same thing looked at in different ways. If so, then the fact that doing  $\phi$  would wrong someone is a reason not to do it—precisely the same reason that is provided by the fact that you owe it to that person not to  $\phi$ . The two relationships are one and the same; they are flipsides of the same coin.<sup>3</sup> And therefore aiming to perform one's duty just is aiming not to wrong anyone, as hoping for heads just is hoping for not tails. In short, the view to be challenged is not that a potential wronging would count as an additional reason against an action over and above the other reasons that make an action wrong,<sup>4</sup> but rather that a potential wronging is normatively significant as part of—or as one way of describing—what counts against an action in the first place. This suggests the appeal of the view: when we say that some action would wrong another person, it is tempting to think that this

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<sup>3</sup> This is importantly different from a similar sounding argument that Samuel Scheffler makes about relationships of partiality:

A valuable relationship transforms the needs and desires of the participants into reasons for each to act in behalf of the other in suitable contexts. At the same time, it gives each of them reasons to form certain normative expectations of the other, and to complain if these expectations are not met. In particular, it gives each of them reason to expect that the other will act on his or her behalf in suitable contexts. These two sets of reasons—reasons for action on the one hand and reasons to form normative expectations on the other—are two sides of the same coin. They are constitutively linked and jointly generated by the relationship between the participants. Insofar as we have a valuable relationship, I have reasons to respond to your needs, desires, and interests, and insofar as those reasons are compelling or decisive, you have complementary reasons to expect that I will do so. (Scheffler, 2010, pp.53-54)

Scheffler's claim is not that the fact that someone would be wronged counts as a reason for action, nor is it that the reason for acting and the reason that the other person is wronged are the same reason. Rather, his claim is that there are two different sets of reasons that spring from the same fundamental relationship. This claim is compatible with my argument.

<sup>4</sup> I also think that this view would be false. The arguments in the chapter do, I think, count against such a view, but I do not take it to be a very plausible candidate position to begin with.



is a description of, or allusion to, the moral reasons against that action.<sup>5</sup>

In this chapter, I offer two types of arguments in response to this general line of thought—one metaphysical, the other practical. Section 5.1 argues, by way of two analogies, that there is something conceptually mistaken about aiming to avoid generating complaints in others—that moral deliberation is not like that. This difference suggests that directed duties and potential wrongings do not play the same role for deliberating agents. This points to a qualitative difference between rights and wrongings. Section 5.2 offers a more practical line of argument. There, I argue that whether one will commit a wrong does not track the question of what one ought to do. I shall try to show that (a) there are cases in which an action would make it the case that one has wronged another and yet one is not morally required to avoid that action, and (b) there are cases in which the fact that an action would wrong another provides no reason at all for not performing that action. This points to a difference in extension between potential wrongings and moral obligation. Section 5.3 attempts to provide some error theory about why it has so often seemed as though the potential wrongs to others of our actions constitute morally significant reasons and attempts to suggest what—if not the way that we might wrong others—is doing the normative work in these cases.

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<sup>5</sup> This view should be contrasted with a weaker claim, which I do not dispute. It is plausible that, whenever one commits a wrong, one must have acted wrongly somehow at some point. Wrongness may still be a necessary ingredient in any wrongdoing. Consider an analogy. It is probably true that one only gets lost if one has taken a wrong turn. But that does not mean that following directions—making sure that one makes the correct turns—is the same as trying not to get lost.

## 5.1 TWO ANALOGIES

AS A DESCRIPTION OF THE PHENOMENOLOGY of moral deliberation, I think it is not the case that one aims at avoiding wrongs or complaints. One does not—or at least one should not—go through the world attempting to avoid wronging others. The best way that I see to argue for this point is by way of analogy. Aiming to avoid wrongs is a bit like a lawyer determining the right thing to do on the basis of what is most likely to avoid liability. Or, similarly, it is a bit like the person who goes through life trying to avoid having regrets. Even if such a mode of deliberation had no differences in result, it would involve—to borrow a phrase—one thought too many.

### 5.1.1 LEGAL LIABILITY

In a major study, a collection of major law-and-economics scholars studied how jurors arrive at punitive damage awards (Sunstein et al., 2002). What they found was that jurors behaved in a number of highly “puzzling” or “problematic” ways (a result that surely did not disappoint ExxonMobil, which funded the study). One of the results that the economists found puzzling was that jurors seemed to penalize businesses that engaged in cost-benefit analysis (Viscusi, 2000). That is, jurors awarded higher punitive damages when a business weighed the costs of potential injuries or deaths in deciding to pursue a particular course of action than if the business engaged in no such analysis. What was even more peculiar was that the higher the cost that a business assigned to potential injuries or deaths, the higher

the punitive damages jurors awarded. To the economists, this finding was highly bizarre: the more safety-protective a business's cost-benefit analysis was, the more the business got punished.<sup>6</sup>

I have to admit that I'm sort of with the jurors on this one—it doesn't seem that crazy to me. If I were on a jury and a corporation anticipated being held liable in a certain number of wrongful death suits, which it anticipated costing \$5 million dollars each, but determined that was not worth the cost of the added safety feature to avoid those suits, then the first thing that I would want to do is hit that corporation with more than \$5 million in damages. And I would probably be more lenient with a corporation that caused the same injuries in the same manner, but was completely oblivious to the fact that it would face legal liability for it.

Why? The oblivious corporation would cause harms that the cost-benefit corporation would avoid, and, in that sense, the oblivious corporation is objectively more dangerous. So why would I—and apparently most real jurors—punish the liability-anticipating corporation less?

I think the answer is that there is something misguided about viewing one's reason for complying with the law as equivalent to one's reason for avoiding legal liability. What the cost-benefit analysis does is treat the reason for avoiding wrongful conduct as equivalent to the cost of legal liability. The economists viewed this as perfectly natural. For them, the point of legal liability is to generate a reason to avoid socially detrimental conduct without deterring socially advantageous be-

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<sup>6</sup> “This effect is exactly counter to expectations... Companies are consequently in the bizarre position of increasing the potential damages award that the jury may levy the greater the weight they place on consumer safety, as reflected in their internal value-of-life estimate.” (Viscusi, 2000, p.125).

havior. So deliberating about potential liability is the same as deliberating about what one ought to do. The non-economists among us, however, seem to think that there's something wrong with this.

I want to harness this intuition. We appreciate that there is a difference between aiming to fulfill one's legal duties and aiming to avoid legal liability. Of course, one difference is that actual (i.e. imposed) legal liability may be less than our legal obligations. Not all legal transgressions will be detected and penalized, so a focus on avoiding actual legal penalties would clearly be different than a focus on complying with one's legal obligations. But I mean to be suggesting more than this. Even a well-intentioned corporation that did not plan on avoiding deserved legal liability would, I think, be focused on the wrong thing if it determined how to comply with the law by considering what its liability would be. It is a mistake to equate one's reason to comply with the law with the reason one has for avoiding legal liability, even liability in principle rather than liability in practice.

But, one might say, wrongful death suits are a loaded example. Isn't it okay to consider what speed is unlikely to get you a speeding ticket when you decide how fast to go on the interstate? Perhaps. I suspect that this example turns on two things. First, we may think that going 70 mph in a 65-mph zone isn't really breaking the law—it's complying with the conventional understanding of the law. In thinking about what we are likely to be ticketed for, we may be thinking about what the legal norm really demands.

Second, and more importantly, in some minor regulatory offenses—like getting a speeding or parking ticket—we may accept a view like the law-and-economics

picture according to which the law is basically imposing a price or tax on certain activities. In fact, these are the exceptions that prove the rule. In general, if one has the same respect for the law as one has for speed limits, then one is doing something wrong. One should not assume the attitude that breaking the law is something for which one simply pays the price and moves on. It's true that, if we do break the law, there is nothing to do but pay the price and move on. Yet that does not warrant a deliberative approach that views the law as assigning a price. Such an approach conceives of the law's normativity too indirectly.

The point is about the concepts being used in deliberation and not about the results. It might be the case that two people, each of whom places equivalent weight on complying with the law or avoiding legal liability respectively, would end up engaging in the same behavior. My hope, however, is that one has the sense that the person aiming at complying with the law is reasoning more correctly. She's got her deliberative eye trained on the right thing.

#### 5.1.2 REGRET

Above, I picked on economists and praised ordinary human preferences. To be fair, I'll flip things around now. Economist Richard Thaler studied people's responses to the following example:

Mr. A is waiting in line at a movie theater. When he gets to the ticket window he is told that as the 100,000th customer of the theater he has just won \$100. Mr. B is waiting in line at a different theater. The man in front of him wins \$1,000 for being the 1,000,000th customer of the theater. Mr. B wins \$150. Would you rather be Mr. A or Mr. B? (1991, pp.15-16)

What Thaler finds, surprisingly, is that some people would prefer to be Mr. A. The reason, apparently, is that some people think that the additional \$50 is not enough to offset the regret of just missing out on \$1,000.

This strikes me as kind of bizarre. Why does this seem irrational? One might think that it's because one has no control over where one stood in line. But this isn't literally true; one could have gotten in line one spot earlier if one had only avoided dilly-dallying en route. Lack of control might be meant in a different way, though. One couldn't control whether one stood in the winning spot in line because one was unaware of the necessary facts. It seems irrational to regret which place one assumed in line because one didn't know in advance the significance it would have. But it seems to me that this isn't correct either. It actually seems rather common to regret an action as a result of unforeseen (and even unforeseeable) consequences. "I really regret not listening to my normal radio station yesterday—I heard that they picked my name out of the phonebook and were prepared to give me a prize if I had been listening and called in." "Man, I wish that I'd gone last night—I never would have guessed that David Beckham would crash a random Somerville house party." So I don't think that what's irrational is thinking that Mr. B would feel regret at missing out on the big prize.

Why, then, does it seem strange to say that one would prefer to be Mr. A? I think the answer is that there seems to be something amiss about making a choice simply to avoid regret. That is, what is mistaken is not the claim that Mr. B would feel regret, but the claim that this fact counts as a reason not to want to be Mr. B. Although the self-help industry urges us to "live a life without regrets," there seems

to be something misdirected about making a choice based on the aim of avoiding regret. What seems strange about preferring to be Mr. A is that, in considering the reasons for one's choice, one is considering not just which option is more attractive going forward but also which option has a more attractive history. Including regret as a deliberative consideration in this way seems misdirected. That is, anticipated regret doesn't seem like a consideration that matters in the deliberative standpoint when deciding what to do (in this case, be someone).<sup>7</sup> The selection of Mr. A is peculiar because the question was framed as a first-personal choice. If the question had been "Which person do you think is likely to be more pleased?" it would not seem nearly as strange to select Mr. A.<sup>8</sup> But in the first-person question, "Which person would you rather be?" it seems more strange to include regret. I think this is, in general, because deliberation ought to focus on what is best going forward, not what will look best in a historical lens.

There are two clarifications of the claim that I mean to be making. First, the claim that I want to make is about the mode of deliberation and not about the result. It may be that two people, one of whom aims simply to live a fulfilling life and the other of whom aims to live a life without regrets, will end up living identical lives. My claim is that the latter person's deliberation is nonetheless aimed at the wrong thing. He will be involved in a conceptual confusion. He has surrendered the immediate deliberative question of what he ought to do for the specu-

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<sup>7</sup> I should note that these thoughts don't seem to apply to 'agent regret' whatsoever. If Mr. A gets \$100 and Mr. B faultlessly kills a child and gets \$150, I think most anyone would prefer to be Mr. A. But this is a puzzle about the nature of agent regret.

<sup>8</sup> I suspect that the minority who selected Mr. A for Thaler were simply interpreting the question in this way. Of course, this isn't unreasonable. The very form of the question "Which person would you rather be?" is a bit hard to interpret.

lative question of how his actions will appear when evaluated in retrospect. His deliberation is, in a sense, viewed through an unnecessary additional lens or mirror. And this redirected view seems in tension with the deliberative standpoint. As Richard Moran has observed, “there remains the sense in which the stance of agency is subject to different constraints from the stance of appraisal of oneself.” (2001, pp.192-93)

Second, the point isn’t meant to be only about avoiding actual feelings of regret. It might be that one could, for example, take a pill that would eliminate any actual regret one might encounter. In such a situation, avoiding actual regret would obviously diverge from avoiding regrettable activities. But my claim is that there is something conceptually mistaken even in aiming to avoid regrettable actions. The regrettability of actions is, one might say, epiphenomenal. So even if one’s focus is not on actual feelings of regret but on what would be regrettable, I think one has something conceptually misaligned.

### 5.1.3 WRONGS

My claim is that viewing the potential complaint of, or wrong to, another person as an important reason for action makes a parallel mistake to that illustrated by the legal liability and regret examples. Even if seeking not to wrong others results in the same behavior as seeking to fulfill one’s duties, it seems to be aiming at the wrong thing.

More particularly, it seems to be aiming at a derivative consequence rather than the normatively significant feature. It’s a bit like saying, “if you are playing poker,



you shouldn't have five aces in your hand." This is true, because if you have five aces in your hand, then you are cheating, and you shouldn't cheat. But the thing that matters is not cheating, not the five aces per se. Similarly, if you have wronged someone, then you have generally done something that you ought not to have done. But the thing that matters is doing what one ought to do, not the wronging per se. It is the obligation that is the bearer of the normative significance.

This sense that the concepts play different normative roles is meant to challenge the thought that obligations and potential wrongs are simply flipsides of the same coin. Notice that one could say the same thing about complying with the law and avoiding legal liability, or living a good life and avoiding regret. Each pair might be viewed *in some ways* as flipsides of the same coin. But they are still, I have meant to suggest, importantly distinct. Metaphysically, they are different things. And one way to see how they are different things is to see that one is normatively guiding and the other is not.

My central claim is that the same is true of our duties owed to others and the potential wrongs that we may do them. From the deliberative perspective, one is primary and the other is epiphenomenal. This difference in normative significance suggests that the two are not simply different descriptions of the same idea. One is normatively guiding and the other is not.

Admittedly, my argument in this section is merely an argument by analogy. The hope is that what feels mistaken about deliberating based on legal liability or regret will transfer by analogy to deliberating based on potential wrongs. But there is a way in which the argument is more than mere analogy. This is because the concept

of wronging another is not simply analogous to the ideas of legal liability and regret, but is often actually described in terms of these ideas. Consider the quotations with which this chapter started. For the Bible and for Kant, the idea of wronging another is very much bound up with the idea of breaking a law. Erasmus describes the reasons not to commit a wrong as bound up with avoiding a particular sort of regret. So it's not simply that wronging can be analogized to legal liability or regret, but that it is often described in these very terms. In this sense, these analogies are particularly tight.

## 5.2 DIVERGENCE IN PRACTICE

THERE IS A MORE PRACTICAL WAY to see this distinction. If our directed obligations and the potential wrongs we might do are just flipsides of the same coin, then they will not come apart. That is, there would not be cases in which a potential wrong exists without providing a reason for action. But I believe that wrongs and reasons do come apart in precisely this way. I mean to highlight three ways in which the presence of a potential wrong to another does not provide the sort of reason that is associated with a moral duty owed to another. In these cases, conceiving of the potential wrongs as normatively guiding is not only descriptively mistaken but would also lead to the wrong results.

### 5.2.1 POTENTIAL WRONG AS NOT A DECISIVE REASON: SUBTRACTED OPTIONS

First, I believe that there are cases in which the fact that another person will be wronged if one does not perform an action does not entail a duty to perform that

action. That is, there are cases in which there is no duty to avoid committing a wrong.

Imagine that a friend asks to borrow your car the next day in order to get to a doctor's appointment in the big city. You live in a rural area where transportation options are scarce, and this is a pretty natural request. She says that she can secure other transportation, but she has to make her reservation within the next hour. You aren't doing anything the next day, so you promise her that she can borrow your car for the day. Unfortunately, that evening, you find that your husband let your neighbor Jimmy take the car that morning and the car is now out of the state. You had forgotten that a few days back your husband mentioned something about there being a chance he would let Jimmy take the car for a couple days at some point. So your promise to your friend was negligently given and she now has no way to get to her doctor appointment. It occurs to you, however, that your husband and you have been considering buying a second car anyway, and you have a nice used pickup all lined up and financing ready to go. You were still mulling it over. If you go to the lot tomorrow morning and buy the pickup, then you'll have it in time to lend it to your friend.

If you don't buy the truck and your friend is unable to get to her doctor's appointment, then it seems to me that you will have wronged your friend. It wouldn't be the sort of grave injustice that drives epic literature, but she would have cause to feel aggrieved—she would have a complaint against you. It also seems to me that you would avoid wronging your friend if you were to buy the pickup truck. Nonetheless, it does not seem to me that you are under a moral obligation to buy

the pickup truck. In other words, the fact that you will open yourself to a complaint if you do not buy the truck does not mean that you are obligated to do so. The potential wrong does not entail a duty.

One may be tempted to respond that it is not true that you will avoid wronging your friend if you buy the pickup. One might say that you have wronged your friend at the very moment that you negligently promised. This is a tempting thought because that is, of course, the moment at which you did something that you ought not to have done. And philosophers sometimes do insist that a wrong is committed by any act that wrongly puts the interests of another at risk.<sup>9</sup>

This description strikes me as overly formalistic. First, it would imply that the same wrong is committed regardless of whether the promise is fulfilled, or even how it is fulfilled. Suppose that moments after promising your friend, your husband calls you and tells you that he has lent the car out, which you promptly relay to your friend, affording her ample time to reserve other transportation. Or suppose that Jimmy gets back from his trip early. Or suppose that your husband never even lent the car to Jimmy, but only mentioned the possibility. The view described would claim that in any of these cases the same wrong was committed. In a sense, the view that the wrong inheres in the very moment of negligence amounts essentially to a denial of the entire phenomenon of resultant moral luck.

Second, insisting that the wrong is already committed makes it hard to explain what one would be doing in attempting to repair one's negligence before any harm is done. I said that you do not have a duty to buy the pickup truck. But it does seem

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<sup>9</sup> See, e.g., Kumar (2003).

to me that your promise gives you some (however small) reason to buy the pickup truck. One benefit you might see in buying the pickup truck would be that it would allow you to fulfill your promise. But if one views oneself as having committed the wrong at the moment of negligence, then one cannot straightforwardly explain the fact that you might still see yourself as attempting to fulfill your promise. If the wrong has already been committed, then what are you trying to do?

There are several possible responses, all problematic. One answer would be that your sense of obligation is not promissory but simply a form of the general obligation to prevent harm to others when one can. But this doesn't seem to capture the way in which your promise figures into the deliberation. It would suggest that you would have the same reason to buy the pickup regardless whether your friend's need of a ride was due to your negligence or mere chance, whereas you see yourself as moved in part by the fact of your promise. A second thought might be that your efforts to make repair are an attempt to provide compensation for the wrong you committed by negligently promising. But this wouldn't explain why one would aim to provide a vehicle as opposed to offer compensation in any other way. A final answer would be that there are two wrongs—the wrong of giving the promise negligently and the wrong of not fulfilling the promise. I think there is something correct in this idea, as I shall discuss in a moment. But, as a way of preserving the idea that wrongs and duties go together, the idea is a nonstarter because it leaves the initial puzzle intact: you could avoid the second wrong by purchasing the pickup and yet you are not obligated to do so. The general point is that, if one thinks that the wrong is fully consummated at the moment of negligence, then it is

hard to make sense of the fact that one might view oneself as attempting to avoid the wrong by repairing the situation before the injury occurs.

So what is going on in this case? I think the example operates by removing from the realm of possibilities the action that the promisee is entitled to demand. Somewhat artificially, we might think of there being three possible actions for you when you make the promise: (1) fail to fulfill the promise and wrong your friend, (2) lend your friend the car, and (3) buy the pickup and fulfill the promise with it. Again somewhat artificially, we might say that the promise gives your friend a right to (2)—she is entitled to demand that. But then circumstances that you had reason to foresee remove that possibility. All that is left is (1) and (3). Option (3) is not something that your friend is entitled to demand of you as part of the promise, but (1) will count as wronging her. You don't have a duty to buy the pickup because it is more than your friend has a right to under the promise, but if you don't do it then you will have wronged her. Were your friend's right really a right to [Not (1)], then the impossibility of option (2) should imply a right to (3). But I think that it does not. And this suggests that not being wronged isn't really what the right amounts to.

### 5.2.2 POTENTIAL WRONG AS NOT A DECISIVE REASON: ADDED OPTIONS

The previous example works by subtracting an option. I think that something similar can occur where possibilities are unexpectedly added. Imagine that you and two friends decide to rent a sailboat for a day and take a spin around the harbor and nearby islands. It's a beautiful day, but the seas are definitely choppy and the boat

is getting jostled a great deal. During your turn at the helm, one of your friends is suddenly knocked overboard by a large wave. Startled, you very carelessly and abruptly turn the boat, and the boom of the mainsail goes swinging across, catching your other friend in the chest and knocking him into the water. Now both your friends are in the water—one due to no fault of yours and the other due entirely to your negligence. Both are relatively poor swimmers and look to be in equally serious trouble. If you save one, you may not be able to save the other.

It seems to me that it is permissible to save either friend. You are not under a duty to save the friend who is in the water due to your negligence. But if he suffers injuries or drowns, then you will have wronged him in a way that would not be true of the other friend.

One might think that actually you would wrong whichever friend you don't save, and this is what makes either choice seem permissible. It is only because of your negligence that you would have to save the second friend, and, as a result, if you don't save the first friend, it is because of your negligence also. Your negligence wrongs the first friend by creating a dilemma where there otherwise wouldn't be one.

Whether or not this is correct, the example can be rejiggered to avert this. Suppose, for example, that you had nothing onboard long enough to reach your overboard friend. But, by sheer luck, when the second friend is knocked into the water, it splashed a very long piece of driftwood onboard that can be used to save either friend. In this case, it is not true that you would have been able to save the first friend if you had not been negligent. Still, it seems permissible to save either

friend.

This claim about permissibility is compatible with the thought that you do have an additional reason to save the friend that you knocked into the water. What is essential to my argument is simply that you are not under a duty to save that friend, even though he is the only one who stands to be wronged.

Still, it is worth commenting on the idea that your responsibility for his situation gives you an additional reason. I see two ways of interpreting this thought. First, one might think that one bears an extra reason to remedy those evils for which one is causally responsible. This is the reason why we have a reason to care especially about those who are harmed by our actions, even our non-negligent actions.<sup>10</sup> This responsibility for consequences of our actions is not the concern of my argument. First, this doesn't seem like the sort of thing that is owed to the other person as a matter of right. It is true that I ought to care about those whom I harm through no fault of my own, but this is not something that is owed to them in the same way—it is not their right.<sup>11</sup> Second, one could reconstruct the example such that both friends are caused to fall into the water by your actions, one negligently and the other non-negligently. For example, suppose that instead of a wave, the first friend falls into the water as a result of your non-negligent turn of the boat to avoid a previously concealed rock. In this example, causal responsibility would be symmetric, but the potential wrongings would be asymmetric.

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<sup>10</sup> This phenomenon is what arises in the literature on moral luck. See Nagel (1979), Williams (1981). Although obviously related, I do not see that question as directly bearing on my topic for the reasons articulated in the text.

<sup>11</sup> Susan Wolf makes something like this point in describing “taking responsibility for one’s actions and their consequences” as a “nameless virtue” (2001, p.13).



A different interpretation of responsibility's significance would be that one has an additional reason not because one is causally responsible, but because one is morally responsible. In this sense, one owes it to the friend who you knocked in to save him, just as you owe it to someone you injure in a car accident to pay his medical bills. One owes it to a victim as compensation or remedy for the wrong committed. Perhaps preferential rescue can similarly be a form of compensation.

I see a few reasons to resist this thought. To begin with, if rescue—let alone preferential rescue—were a form of compensation, then it should reduce the amount of other compensation owed. But it doesn't. If a doctor imperils a patient through malpractice but is able to recover, save the patient's life, and limit the damage, the doctor does not owe the patient less in compensation than she would if a different doctor had been the one to do the saving. So acting to save the person that one has imperiled doesn't seem to count as a form of compensation. Put metaphorically, when someone is imperiled, the question is about limiting one's moral liability, not about discharging it. Likewise, pulling your friend out of the water would not ordinarily be considered compensation for knocking him in. In part, this is because one ought to rescue him, irrespective of whether one owes him compensation, and doing one's duty doesn't seem like compensation.

I see little reason to think that the same act, when done in preference to another similar act, should be viewed as compensation. For one thing, it would seem unfair to the dispreferred person, whose chance to be saved would be lost so that a wrongdoer could make amends. And it would also seem unfair to the victim, who would receive less (other) compensation due to the circumstances extrinsic to his

or her relation to the wrongdoer. The malpracticing doctor still doesn't owe any less in compensation, I think, if she left other patients on the operating table in order to save the one she imperiled. So it seems to me that compensating the friend that you knocked into the water does not give you a reason to save him over the other friend.<sup>12</sup> But, even if I am wrong about this and compensation provides a reason to save the second friend, I maintain that it is at least permissible to save the other friend—the fact that you would do a wrong does not correlate with a duty.

Above, I criticized the view that the wrong inheres in the negligence itself. But there is something correct about that view as an explanation of some cases, and the sailboat example reinforces that. Once you have knocked the second friend into the water, it seems like you have already wronged him. But I think it would be a mistake to think that the wrong is already, so to speak, used up at the moment of negligence—that what happens next doesn't affect the wrong committed. You will have done him a much greater wrong if he drowns than if he simply gets a bruise on the chest and some wet clothes.

What I want to suggest is that *the rights violation* inheres in the act of negligence, but *the wrong* involves within it the subsequent consequences and harms.<sup>13</sup> The second friend's right—what he was entitled to from you—was to have the boat

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<sup>12</sup> This is not to deny that, in general, giving preference can be a form of compensation. Affirmative action arguably works in this way. But that is a matter of giving preference in awarding positive benefits, not giving preference in performing one's duties. Creditors who have been wronged, for example, do not jump ahead of creditors with prior claims. And, despite the common use of affirmative action in many domains, we do not see it in contexts where we arguably owe the limited benefit to all possible recipients—medical triage, creditors rankings in bankruptcy, welfare for basic-needs, etc.

<sup>13</sup> This explains, I believe, why reckless drivers who do not kill anyone face less legal liability as those who commit reckless homicide. As discussed in the next chapter, wrongs involve elements, such as the resulting harm, that are not part of the rights violation.

not turned unexpectedly. You owed this to him. And, in this respect, you failed. What wrong you have done him depends on what happens after this.

This explains why you do not have a duty to save the second friend, even though your wrong will be greater if you do not. What he was owed has already passed. He was entitled to your care in turning the ship. But he is not entitled to be saved at the expense of the other friend. He does not have that right. So, even though the wrong done will be greater if he is not saved, that is not something to which he has any particular rights claim.

In this example, injuries first arise close to the moment of negligence. At the time that the choice about whom to save is presented, there is already a wrong committed and only its magnitude is in question. But that is really only a contingent feature of the example. Consider a point that Frances Kamm offers to illustrate that the demands of rights are not simply captured by a requirement to minimize one's rights violations. "May I kill one person now to stop a threat I started yesterday that will soon kill five people? I think not." (2002, p.492). This seems correct. If you have planted a time bomb that will kill five people, it is not permissible to violate one person's rights in order to prevent the bomb from going off and killing the five. This is true, according to Kamm, despite the fact that you will violate fewer people's rights if you kill the one. But I think this is not precisely it. It seems to me that you violate the rights of the five simply by placing the time bomb near them. It's true that the wrong (in Kamm's locution, "the rights violation") doesn't really occur until the bomb goes off, but that's another matter. What the example really shows is that you cannot violate one person's rights in order to avoid wronging

five others. And this is the point that I am trying to make: it is the rights that are normatively guiding, not avoiding wrongs.

In both the time bomb and the sailboat examples, the presence of additional considerations concerning others means that something someone might normally be entitled to as a matter of right is no longer something that he or she can demand. Consider the boat case. Your friend has a right that you not cause him to be drowned. Normally, this right includes both a duty not to knock him in the water and also a duty to pull him out if you do. (I don't know that there is anything at stake in whether we call these duties all part of the same right, or two separate rights.) Your friend is entitled to both of these things from you. Normally, even if you knock him in the water, your choices would be: (1) do nothing, or (2) pull him out and avoid (further) wronging him. And from these, he is entitled to demand that you choose (2) over (1). When the other friend ends up in the water, it makes the choice more complicated. Now there is a third option, (3) pull out the other friend. And from this larger set, the second friend cannot demand that you forego (3) in order to pursue (2). This is why you do not have a duty to save the second friend—he is not entitled to that. Still, the presence of option (3) doesn't change the fact that you will be (further) wronging the second friend if you do not choose (2). Similarly, in the time bomb case, the five would normally be entitled to you diffusing the bomb that you have set, but, when diffusing the bomb involves killing someone else, then that is not something to which they are entitled.<sup>14</sup>

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<sup>14</sup> Notice that ordinarily it is not as though the right is simply used up when you set the bomb. You owe it to them to see to it that the bomb does not go off. And this is more than simply the general duty to prevent others from being harmed when possible. You would owe it to the five to go to much further sacrifices in order to prevent the bomb from going off than an ordinary

### 5.2.3 POTENTIAL WRONG AS NO REASON AT ALL

In the examples considered thus far, I have argued that the potential wrong that one might avert does not imply a duty. But that leaves open the possibility that the potential wrong still counts as a reason in these cases. Your promise, you may think, provides a reason for you to buy the pickup truck. And perhaps the way in which you would wrong the friend who fell off the sailboat due to negligence counts as a reason to save him, even if it is not so strong as to entail a duty to save him. But I believe that there are examples in which not even this is the case.

Suppose that as a hobby you engage in recreational pyrotechnics. You enjoy spending your Saturday afternoons setting off various elaborate explosives and fireworks. In fact, there's a secluded plot of land where you and other local enthusiasts often practice. This is legally permitted, and there are signs notifying people to beware. There is, however, an obligation to broadcast a loud warning message before detonating any device. One day, you go out to the park and set up an elaborate explosive display. The display is on a timer to allow you time to get safely away from it. For some reason, today it slips your mind to broadcast the warning signal. After you have walked away and are looking back, you see that two local children have approached the device. One is a local orphan girl who has no family and no one who cares for her. The other is a boy with extremely loving parents who would be absolutely heartbroken if he is injured or killed. You have enough time to get one child away from the device, but probably not both.

In the previous chapter, I argued that a person can be wronged if one violates  

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bystander would.

the rights of their loved ones. This, I think, is a case in point. An injury to the second child would potentially involve wronging his parents as well as him. If you save the orphan girl, you will wrong more people than if you save the little boy.

It seems to me, however, that not only does this fact not entail a duty to save the little boy, but that it would be positively mistaken to treat this as a reason to save the boy at all. There are evenly balanced reasons for saving each child, and the fact that failing to save the little boy would also wrong some related parties does not provide a tiebreaker. It is no reason at all.

One might think that this does not speak to something unique about wrongs. One might see it, instead, as an example of the more general phenomenon that it is mistaken to consider comparatively smaller claims to be tiebreakers between significant rights claims. As Frances Kamm has pointed out, there seems to be something perverse about deciding which person to save based on the tiebreaking fact that you could cure some third party's sore throat (2006, pp.61-63). So, one might think, perhaps this case is like that one: In the face of the tie between the major claim-rights of each child, the parents' potential injury is "an irrelevant good" relative to the lives at stake.

I think that this explanation is not correct for several reasons. First, bluntly, it seems to me false to think that a parent's grief is comparatively small, on par with a sore throat. Kamm accepts that if a third party stands to lose his legs, then that fact can serve as a tiebreaker. But I suspect that many parents would prefer to lose their legs than their child. Second, one could easily retool the example to make the parents' stake have a different character. For example, suppose that you know

that the little boy is scheduled to be a bone marrow donor for his father. This fact augments the complexion of the wrong you will potentially find yourself having done to the father. But it still seems perverse to consider this a tiebreaking reason. What matters are those who have a right against you, and in this respect the two sides are balanced.

Finally and most conceptually important, in the sore throat case, there isn't the same asymmetry between wrongs and reasons. What motivates the sore throat case is the thought that the person suffering from the sore throat would not be wronged if you don't cure his or her sore throat—the person would have no complaint.<sup>15</sup> The sore throat isn't a reason, but it also wouldn't be a cause for complaint. But, in the pyrotechnics case, the parents would be wronged, and yet the wrong to them isn't a reason.

Of course, all of these examples are artificial. One might be tempted to dismiss them as outliers. But I think that, once one concedes that the wrong does not provide a reason in these cases, it becomes hard to see a wrong as providing a reason in the more ordinary cases. For example, if one accepts that the wrong to the parents is not a reason in the pyrotechnics example, then consider the case in which only the little boy is at risk (that is, suppose the orphan girl isn't there at all). Given that the potential wrong to the parents isn't a reason in the first case, it's hard to

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<sup>15</sup> Kamm says that the important question is, "Would the tiebreaker have a complaint for his own sake, based on the seriousness of his own need, if he does not break the tie?" (2006, p.62). One might think that the reason the parents don't count as a tiebreaker is that their complaint isn't "for their own sake." Although it is obviously hard or impossible to disentangle a parent's self-regarding and child-regarding concerns, it seems strange to think that at least part of a parent's interest in their child is "for their own sake." Tangled as the question is, parenting surely isn't pure altruism. Second, the bone marrow amendment would eliminate this response.

see why it would be in this case either. And if this is correct—if it is only the potential wrongs to the actual rightholders that are normatively significant—then it seems natural to conclude that it is the right that is doing the normative work.

I have been arguing that there are cases in which there is a potential wrong that one could avoid and yet that does not entail a duty or even a reason to act. I will close this section by noting that I also believe the opposite asymmetry is possible. One can have a duty that is owed to another person and yet that other person would not have a complaint if one fails to perform this duty. That phenomenon is the subject of Chapter 7. I mention it here in order to be clear that the asymmetry between wrongs and reasons runs both ways.

### 5.3 DRAWING ATTENTION TO THE OTHER

IF THE ARGUMENTS I HAVE MADE are correct (or in the right ballpark), then why have so many philosophers thought that the potential wrong that we might commit against another constitutes an important reason not to pursue an action — even the essential moral reason? The answer, I think, is that focusing on the wrong that one might commit is a way of drawing our attention to the other person. It is, so to speak, a way of emphasizing the moral stakes.

In George Eliot's *Middlemarch*, young Fred Vincy recklessly borrows money that he is unable to repay. Of the episode, Eliot writes,

Curiously enough, his pain in the affair beforehand had consisted almost entirely in the sense that he must seem dishonorable and sink in the opinion of the Garths: he had not occupied himself with the inconvenience and possible injury that his breach might occasion them,



for this exercise of the imagination on other people's needs is not common with hopeful young gentlemen. Indeed we are most of us brought up in the notion that the highest motive for not doing a wrong is something irrespective of the beings who would suffer the wrong. (1873, p.88)

What focusing on potential wrongs does, to its credit, is ensure that the reasons for obeying morality are not "something irrespective of the beings who would suffer." As Richard Moran writes of this very example, "Fred Vincy's guilty consciousness of himself blocks his attention to the actual object of his guilt: his actions and the beings who suffered the wrong" (2001, p.192).

By suggesting that the potential wrong that one would commit is central to understanding the reasons and duties that morality generates, one draws attention to the fact that moral obligations are often not just free-floating, but rather they are owed to other persons. Emphasizing the wrong that one would do to another is a way of shaking someone from a merely monadic conception of duty. It is a way of exhorting someone to recognize the significance and character of moral duties.

But sometimes a statement that is evocative of the truth along one axis will sacrifice accuracy along another. Notice, for example, that the sorts of considerations with which I began this paper can also serve an exhortative function. Someone might, for example, say, "Don't get us into any legal trouble on this," without meaning to imply that breaking the law is acceptable so long as it isn't detected. The person may mean simply, "Take care to obey the law." The potential legal consequences are referenced more as a way of evoking the significance of legal obligations. Similarly, the self-help industry makes a fortune telling people to "live a life without regrets," and this has resonance because it evokes the significance of

making valuable choices and living a meaningful life. It is a feature of poetic description that sometimes the best way to make a person feel the force of something is not to describe the thing itself, but to describe some other connected thing. My suggestion is that thinking of the potential wrong that one might do to another as a reason for action has this sort of poetic truth to it. It draws our attention to both the stakes and the source of our moral obligation. Seeing that our action might wrong another person reminds us both that our moral compliance matters to the life of someone else and further that this someone is the source of our moral obligation—that morality is relational.

When I consider the wrong that I might commit, I am forced to consider the person whom I would wrong. And this consideration will often lead me to see that the other person is a source of reasons for me. Other things can have this affect as well. Above I argued that the wrong one would do to a child's parents is not actually a reason. But it is perfectly familiar to think of someone appealing to the injury that one might do to family members as a way to encourage care. "Think not only of the person you might hurt, but of the innocent family and the sorrow that it will bring them." What one does in saying this, I think, is not give an additional reason for taking care, but rather evoke the importance of the existing reason. It both says something about the importance of morality generally and it evokes the fact that the potential victim is a real person. It is a bit like other evocative things that one might say that have little direct significance. "Think of how innocent she looks when she smiles." "Think of all the birthdays that she will never get to enjoy." I think it would be a mistake to characterize such statements as providing further

reasons. They are simply ways of getting someone to see the reasons that he or she already had. Similarly, viewing the wrong that one might commit as a reason has this sort of poetic truth to it.

But this poetic truth shouldn't be mistaken for literal truth. Although thinking about the wrong that we may do can serve to draw our attention to the duty that we owe another, it is this duty and not the potential wrong that is normatively significant.<sup>16</sup>

This point, I think, helps to clarify what it is to have a right—that is, what it is to have a duty owed to you. It is to be a source of reasons—or, more strongly, a duty—for someone else to act in a particular way. To be a rightholder is to deserve significance in someone else's deliberation. One is not, however, the source of these reasons because one can hold the other person accountable for their actions. That description gets the normative significance backwards. And this is an important way in which wrongs and rights are distinct moral phenomena. One is fundamentally normative, and the other is not.

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<sup>16</sup> In making this argument, I am implicitly rejecting a conception of reasons according to which any evidence that something should be done counts as a reason in favor of doing it. This reasons-as-evidence view has been defended recently by Stephen Kearns and Daniel Star (2008). I believe that this view is false in large part because it would treat as reasons the sort of considerations that I have been suggesting are epiphenomenal to normativity. For example, the fact that I would regret an action will often be evidence that I shouldn't do it. But it seems to me, as I have said, that this is not a reason not to do it. The error theory that I am suggesting in this section turns on the confusion between mere evidence and actual reason. A potential wrong can be excellent evidence—the sort of evidence that can be powerfully motivating—but that does not mean that it is actually normative significant.

*[T]he concept of compensation is ambiguous in the case of contracts: expectation damages make the victim of a breach whole by reference to a benchmark of performance, whereas reliance damages make the victim whole by reference to the position he would have occupied if no promise had been made.*

Louis Kaplow & Steven Shavell

# 6

## An Argument from Remedies

REMEDIES AIM TO COMPENSATE THE VICTIM OF A WRONG. This is a foundational principle of private law, and it is also a moral principle. We generally understand compensation in terms of returning what was previously taken, making whole again. In both law and morality, we think that a wrong has been remedied when the victim has been restored to his or her prior circumstances. This idea

connects wrongs with rights in an important way. We think that what it takes to remedy a wrong is a return of what was there *ex ante*—a restoration of the right that was taken away.

In this chapter, I mean to challenge the straightforward understanding of what it means to remedy a wrong. I argue that the appropriate remedy for a wrong is not determined only by the nature of the right that was taken away. Rather, the appropriate remedy will depend on certain facts that are only present *ex post*—facts about what resulted and about how the transgression is interpreted. These additional facts are important because, from the *ex post* perspective in which wrongs arise, the idea of giving someone what was taken away is ambiguous.

The rough idea can be glimpsed in the quotation from Kaplow and Shavell (2009, p.166). A promisee generally has a right that a promise be fulfilled. But the wrong of breaking a promise is not necessarily measured by how much the promisee expected to gain. Sometimes, it will be better viewed in terms of injury resulting from having been given a bad promise to begin with. Which of these alternatives is appropriate will depend on context, and it may only be clear after the fact. So we cannot straightforwardly say that the remedy is dictated by the right that was violated.

I believe that this feature of remedies—that the appropriate remedy for a given wrong may depend on more than the nature of the right that was violated—shows that wrongs are qualitatively different from rights. In other chapters, I argue that there can be wrongs without a corresponding right, i.e. that there is a difference in extension between wrongs and rights. In this chapter, I am concerned with a

qualitative difference between wrongs and rights. That is, I am arguing that, even where there is a corresponding right, wrongs have a distinct character. Wrongs—as viewed through the lens of what it would take to compensate for them—involve factors beyond just the rights that were violated.

Blackstone wrote that, “[A]s all wrong may be considered as merely a privation of right, the one natural remedy for every species of wrong is being put in possession of that right” (1769, Bk.3, Ch.8). I mean to use this same reasoning in reverse—as *modus tollens* rather than *modus ponens*. If it is not true that every wrong has the single natural remedy of returning the right in question, then wrongs cannot be considered merely the privation of a right. That is, the complexity of remedies challenges the simple picture of wrongs as the mirror image of rights.

A central premise of this reasoning—implied in both Blackstone’s argument and in my own—is that the remedy for a wrong reflects the nature of that wrong. That is, the argument depends on the thought that remedies mirror the wrongs that they remedy. I begin by defending this premise, which motivates the focus on remedies in the remainder of the chapter. Once it is clear that remedies can provide a window into the nature of wrongs, I try to use this window to show how wrongs are shaped by more than the right violated.

## 6.1 REMEDIES AS WINDOWS INTO WRONGS

THIS CHAPTER STARTS FROM THE PREMISE that remedies reflect the nature of the wrongs that they remedy. In one sense, this may be almost indisputable. Remedies are remedies *for something*, and, as such, to know about a remedy is to know

something about what is being remedied. A successful medical remedy tells us something about the nature of a physical injury that it cures. Similarly, a legal or moral remedy sheds light on the legal or moral injury that it cures.<sup>1</sup>

One might try to distinguish two interpretations of this claim. According to a weak interpretation, the fact that something is a remedy might merely provide some evidence about the nature of what it remedies. For example, knowing that ibuprofen makes the pain in my knee go away reveals something about the nature of my knee injury. This is the weaker, evidential way in which a remedy can be illuminating.

But a remedy might be illuminating in a stronger sense if it constitutes the very thing that was lacking. If the remedy for my knee injury is surgically rebuilding the anterior cruciate ligament, that directly reflects the problem, namely that the anterior cruciate ligament was broken. In this case, the remedy isn't merely evidence about the problem. It is the opposite of the problem. The remedy reflects what was in need of correction. That is, it reflects the character of the injury. Remedies correspond with an injury much like negative space corresponds with a positive shape. This strong correspondence derives from the fact that remedies are corrective.

This distinction is a little misleading, though. Return to the ibuprofen for the

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<sup>1</sup> In this context, John Goldberg (2006) usefully distinguishes between two different meanings of "injury." Goldberg argues that the law originally understood injuries as wrongs but that an understanding of injuries as losses has arisen in modern times. The ambiguity that Goldberg describes might suggest that one cannot safely assume that remedies reflect wrongs. But, in fact, my methodology is generally consistent with Goldberg's argument. Goldberg demonstrates the shifting meanings of "injury" by, in part, demonstrating shifting judicial approaches to awarding remedies. That is, Goldberg's argument, like mine, assumes that looking at remedies tells us something about the conception of injury that is at work.

pain in my knee. Ibuprofen is an anti-inflammatory and a pain-killer. The problem in my knee could simply be inflammation, as when I have tendonitis. If so, then the ibuprofen remedy reflects the problem in the second, stronger sense. By reducing inflammation, it answers the problem, namely too much inflammation. On the other hand, ibuprofen might only temporarily alleviate the pain in my knee without addressing the underlying problem. In such a case, the stronger form of remedy-injury correspondence would be missing. But it would be missing, I think, precisely because in that case the ibuprofen isn't actually a remedy. It's a palliative. The ibuprofen is a way of coping with or overcoming what's wrong, but not a way of correcting it. True remedies, I want to suggest, reflect the nature of the corresponding injury in the strong sense.

Legal remedies have this same sort of strong correspondence with the injury being remedied.<sup>2</sup> Suppose that I have a legal grievance with my employer, and it is determined that the appropriate remedy is six weeks of back pay. This remedy is revealing about the nature of the grievance. It illuminates what it was that needed to be corrected. Once again, this illumination is based on the idea that legal remedies are corrective.<sup>3</sup> This idea is so intuitive that it seems almost built into the concept

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<sup>2</sup> This argument might seem to place too much stock in the concept of remedy. In doing so, it may seem to beg the question because we might wonder whether the legal ideas that we call "remedies" are truly remedies in this sense. For example, Birks (2000) makes a plausible argument that the law would do well to replace talk of remedies with talk of secondary or remedial rights. But Birks's argument does not really challenge the idea that, whatever we call it, legal recourse reflects the problem being addressed. That is, Birks is not challenging the corrective function of private law, which is what my argument depends upon. In fact, Birks' strongest argument is that the private law corrects things other than wrongs, and that talk of remedies can obscure this point because "remedy" implies a wrong. Where private law is, in fact, addressing a wrong, Birks seems to have little intrinsic objection to the talk of remedies.

<sup>3</sup> This correspondence with the underlying injury is not to say that remedies are always complete. We often cannot fully remedy an injury. Physical injuries, for example, may be impossible



of a remedy, and, in the law, it seems built into the adage that remedies seek to make the victim whole again.<sup>4</sup> If a different remedy had been appropriate, that would show that the grievance with my employer was different. That is, it would show that what was wrong was something different.

As long as this is true, we can use remedies as a window into the nature of wrongs. Put another way, thinking about remedies will be a way to think about the nature of wrongs. The remainder of this chapter is devoted to using this strategy to think about the nature of wrongs. In particular, I mean to use the particular remedial question posed by the case of *Olwell v. Nye & Nisson*<sup>5</sup> to examine the conceptual composition of a wrong.

Although the chapter focuses on a legal case and questions about legal remedies, I don't think this is critical. The law simply provides a set of formal structures for thinking about the nature of wrongs and compensation. The central question can be viewed as essentially moral: Is the nature of a wrong—as viewed through what it would take to compensate it—correlative to the right that was violated?

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to undo. In such cases, all we can offer is compensation, hoping to offer an equivalent level of well-being as a second-best alternative. The same, however, is true of medical remedies. A replacement joint, for example, may not fully restore its recipient. But it can provide the best functional equivalent available. In both cases, the fact that the recipient is never truly made the same as she was before does not mean that the response doesn't count as a remedy. They are remedies insofar as they are addressed to correcting the injury. They aspire to provide a restoration, even if they only partially succeed.

<sup>4</sup> In section 6.5 below, I will discuss views that do not accept this premise. For now, I am describing the appeal.

<sup>5</sup> 26 Wash. 2d 282, 173 P.2d 652 (1946).

## 6.2 RESTITUTION AND CORRECTIVE JUSTICE

### 6.2.1 OLWELL V. NYE & NISSON

IN 1940, MR. E. L. OLWELL SOLD his half interest in Puget Sound Egg Packers. As part of the agreement, Olwell retained full ownership of an egg-washing machine. The machine was stored in a storage space adjacent to the company. In 1941, after the outbreak of World War II, the company had the machine removed from storage and put to use, without the knowledge or consent of Olwell. Upon discovering the unauthorized use four years later in 1945, Olwell offered to sell the machine to the company, but, after no agreement could be reached, he brought a legal action.

Olwell sought \$25 per month, an amount aimed to recover the benefit that inured to the company as a result of the unauthorized use. The theory behind this legal action was that Olwell could “waive” his tort claim, and sue in “assumpsit” or quasi-contract instead. The trial court accepted the remedy of disgorgement, and issued an award for \$10 per week that the machine was used. This amount was calculated based on the wages for hand-washing that were avoided by using the machine.

On appeal, the company contended that Olwell had “an adequate remedy in an action at law for replevin or claim and delivery.” In other words, the company contended that the appropriate remedy would be for them to give the machine back to Olwell. As such, the company argued that a suit in quasi-contract was inappropriate. Alternatively, the defendant company argued that if any damages were to be awarded, they should be the rental value of the machine, rather than

a disgorgement of benefits. According to this argument, the appropriate remedy to Olwell would be the amount that he would have received from the use of the machine.

The Supreme Court of Washington rejected these arguments and affirmed the order for disgorgement. It focused on the fact that the plaintiff had the right to choose his claim. The logic of the decision, therefore, was clear: (1) Plaintiff “had an election”; (2) “Having so elected, he is entitled to the measure of restoration which accompanies the remedy.” The Supreme Court did, however, modify the trial court’s award insofar as it exceeded the amount requested. Olwell was awarded the \$25 per month for which he had asked, not the \$10 per week found by the trial court.

Two aspects of the case are worth noting. First, there is a vast array of potential remedies. Consider the following options: (1) return of the machine, (2) depreciation of the machine, (3) rental value of the machine, (4) the opportunity cost of being unable to use the machine, (5) restitution in the form of money the company saved through non-paid wages, and (6) restitution in the form of profits earned, (7) nominal damages in symbolic recognition of the violation. Any of these could plausibly be viewed as an appropriate way to respond to the company’s nonconsensual use of the machine. But these various options are, at least in part, in competition with one another. If the court were to award Olwell all of these different remedies at once, he would clearly be overcompensated.

Second, in light of these options, the court essentially gave the plaintiff the ability to choose the remedy. This occurred in two forms. First, by allowing the

plaintiff to decide what sort of claim to bring, the court allowed the plaintiff to determine the correlative remedy. Second, by limiting the award to what was requested, the court again gave primacy to the plaintiff's election in determining the remedy.

#### 6.2.2 WEINRIB AND CORRECTIVE JUSTICE

According Ernest Weinrib, awarding the company's profits did not conform with corrective justice. In Weinrib's view, corrective justice required that "the remedy reflect the wrong and that the wrong consist in a breach of duty by the defendant with respect to the plaintiff's right" (2001, p.20). That is, the remedy is taken to be a direct reflection of the legal right—the two are flip sides of the same coin. Any particular legal right creates an entitlement of one party with regard to another party. When that right is violated, the legal remedy is to give to the wronged party that to which they were entitled. Remedies are not ad hoc social instruments, but rather are part of the conception of a rights relation between two parties. Thus, the specific remedy must be "the notional equivalent at the remedial stage of the right that has been wrongly infringed" (Weinrib, 2001, pp.4-5).

Weinrib views this conception of remedies as reflecting the right implicated as essential to maintaining "the idea of private law." Private law, for Weinrib, uniquely joins private individuals in bilateral right-duty pairs. Unlike, for example, criminal law, which dictates general obligations to act in particular ways,<sup>6</sup> private law creates obligations owed to another private person. Private law simultaneously creates an

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<sup>6</sup>One might think of criminal legal obligations as owed either to the community at large or to no one in particular. Either way, the contrast with private law should be clear.

entitlement in one party and a correlative liability in another. And as such, the contours of a private law right correlate with the contours of the opposing party's liability. The remedy is a reflection of a bilateral pairing between individuals.

With this conception of corrective justice, Weinrib argues that the *Olwell* remedy was conceptually erroneous. Olwell's legal entitlement was to the machine. By using the machine without authorization, the company violated his entitlement to the exclusive use of his machine. The remedy should reflect the entitlement that was violated. As a result, Weinrib argues, the appropriate remedy is the fair market value of using the machine, i.e., the rental value.

By issuing disgorgement of benefits, Weinrib continues, the court assumes an improper framework of what it would mean to make the plaintiff whole. For Weinrib, the baseline comparison that was used was entirely confused: "Basing the damages in *Olwell* on the cost of hand-washing the eggs implies that the defendant was under an obligation to the plaintiff to wash the eggs by hand. This is absurd." (2001, p.20). For Weinrib, the disgorgement remedy would suggest that Olwell had a right to the efficiency of using a machine over manual labor. But, of course, he did not. As Weinrib puts it, "The plaintiff's only interest in the defendant's egg-washing operation is in the use of this particular machine, not in how the defendant would have operated his business without it" (2001, p.20).

According to Weinrib, by awarding profits, the *Olwell* court has stepped outside the bounds of private law. The disgorgement serves extrinsic social purposes: deterrence and revocation of unjustly acquired gains. But these social purposes are not within the scope of private law. Even if the defendant should be stripped of its

profits, the plaintiff is not the one entitled to them.

Instead, damages should reflect the rights between the parties. In his words, “Restitutionary damages, like other remedies in private law, must correct the injustice that the defendant did to the plaintiff. Such damages accordingly must correspond to the elements constitutive of the juridical relationship between the parties” (2001, pp.20-21). In other words, Weinrib’s problem with the *Olwell* decision was that it wasn’t responding to the wrong that was done. If it were correcting the wrong, then it would have awarded the value of what was taken from the plaintiff by the defendant.

### 6.2.3 RIPSTEIN AND THE WRONG OF USE

Arthur Ripstein has not, as far as I know, written anything about the *Olwell* case itself. But he has discussed, from a Kantian perspective, how we ought to think about restitution damages. In *Force and Freedom*, he writes:

[S]ometimes a wrong will be completed, and if it is, its *effects* must be hindered in order to maintain the external freedom of the aggrieved party... [I]f I manage to enlist you in support of my projects without your consent, I must surrender to you any gains I make as a result. I must do so because your right to set your own ends must be treated as an embodiment of your freedom, and so given back to you. So, for example, if you invite tourists to explore the caves under your land, and lead them underground to the caves under mine, you must disgorge any gain you received from the use of my caves, even if I could not have capitalized on them on my own, and even if, had we entered into a contract, I likely would have agreed to let you use them on more favorable terms... Using another’s person or property without his or her permission is never consistent with freedom for all. Because the property exists for the benefit of its owner, the only way to redress

another's use of it is to treat that use as though it were done solely for that person's benefit. (2009, pp.82-83)

In other words, the only way, in Ripstein's view, to remedy an unauthorized use is to give every benefit received from that use to the owner, as though the use were performed for his or her sake.

The basis for Ripstein's argument is that impeding an infringement of rights is itself a way to protect the freedom that rights safeguard. For this reason, rights are associated with an authorization to coerce. Coercion is authorized in such cases because "it restricts a restriction on freedom" (Ripstein, 2009, p.55). He believes that this same idea of impeding a restriction on freedom explains remedial action as well. He writes, "The idea of the hindrance of a hindrance has a second, retrospective aspect to it as well. What is hindered in this case is not wrongful action but its impact on the external freedom of others." (2009, p.82). So the remedial action, when a wrong has been committed, is focused on removing the external impact of the wrong.

Where someone has used property without authorization, that person has appropriated the object to serve his or her own purposes. Ripstein believes that the way to remove the impact of this wrong is by treating the use as advancing the purposes of the owner. Whatever is acquired by unauthorized use must go back to the owner. This is the retrospective response that most hinders the hindrance placed on the owner's freedom. And what this means, in practice, is that the user must disgorge the gains obtained by the unauthorized use.

I think that the contrast between Weinrib and Ripstein is quite striking. It looks like Ripstein is saying that justice *requires* the remedy that Weinrib is calling *conceptual error*. This contrast is especially stark because Weinrib and Ripstein share many of the same commitments—in particular, commitments to Kantianism and to corrective justice. What are we to make of their very different conclusions?

There is some ambiguity in Ripstein's position that might reveal that the difference is less than it would appear. As I understand him, Ripstein is advocating for a disgorgement of profits. For him, whatever is done with unauthorized property should be treated as being done on the owner's behalf. So my sense is that, in the *Olwell* case, Ripstein would have awarded the profits that the company made by selling the eggs washed with Olwell's machine. This is what Weinrib rejects. But Ripstein might say that Olwell should receive only those profits attributable to the use of his machine and that anything else would overcompensate him.<sup>7</sup> This, I suppose, would mean awarding Olwell whatever value was realized from the fact that the eggs were washed rather than unwashed. This would treat the washing of the eggs with the machine as though it were done solely for Olwell's benefit, and it would deprive the company of any gains from using the machine. This amount might be hard to calculate in practice if there is not a robust market for unwashed eggs, but no matter.

What is important for the present purposes is that , however it is interpreted, Ripstein's remedy would be conceptually quite different from two alternatives. First, the value contrasts with Weinrib's suggestion that Olwell receive the rental

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<sup>7</sup> I am indebted to Nick Sage for making this point to me.



value of the machine. And second, it contrasts with disgorging the benefit received by the company, namely not having to pay for hand-washing the eggs. In an efficient market, all of these values might converge on one another, but this is essentially irrelevant. For one thing, we need to know what remedy to award in the real world, where markets are not perfectly efficient. More importantly, this hypothetical convergence does little to alleviate the conceptual difference between Weinrib and Ripstein. Even if they could arrive at the same dollar amount, their rationales would be discordant. This discord is, as I have said, especially noteworthy because one would think that Weinrib and Ripstein's views should be quite harmonious.

### 6.3 REMEDIES AS ESSENTIALLY EX POST

I MEAN TO ARGUE THAT the appropriate remedy depends not only on the nature of the right that was violated, but also on ex post features of the complaint and its context. Thus, what we consider to be the nature of a given wrong, as shown by what we believe to be appropriate compensation, involves more than simply the ex ante character of the right that was violated. In what follows, I describe three ways in which the remedy—and, with it, the character of the wrong itself—depends on other, essentially ex post factors.

#### 6.3.1 DEPENDENCE ON CONSEQUENCES FOR DEGREES

The first point is rather simple. Whatever the conceptual basis for the remedy, the actual remedy will still depend on how much damage is done within that framework. If Weinrib is correct, then the *Olwell* remedy ought to have been the rental

value of the machine. This amount could be more or less, depending on facts about the rental market. If, on the other hand, disgorgement of profits is correct, then the remedy will depend on the amount of profits that was realized. In short, whatever the framework, one must still determine the extent of the remedy required. This remedial determination reflects a judgment about the extent of the wrong that needs remedying.

These inquiries mark a clear qualitative difference in the structure of rights violations and wrongs. Wrongs come in degrees in a way that rights violations do not. We can ask *how badly* was someone wronged? We want to know the *extent* or the *magnitude* of the wrong. We naturally speak about one wrong being *greater or lesser* than another. And this is true even where the rights violation is held constant. For any given right, a violation either occurs or does not occur. But the resulting wrong is not binary in this way; its can come in different degrees. If one believes that wrongs are conceptually equivalent to right violations, then such calculations and comparisons should be a puzzle. If the two are conceptual analogs, then why does one come in degrees in a way that the other not?

Someone who considers rights violations and wrongs to be essentially equivalent might attempt to deny this qualitative difference by refuting one side of the disanalogy or the other—that is, either by rejecting the binary nature of right violations or by rejecting that wrongs come in degrees. Adopting the first of these approaches, someone might point out that the degrees in wrongs may be, in part, based on the importance of the right that was violated. That is, wrongs may be considered greater because they are violations of rights that are more highly valued or

more fundamental. (Notably, even here, it is still awkward to speak of a “worse rights violation.”)

While it is very plausible that wrongs can be greater based on the type of right that was violated, I find it implausible to say that this can account for all differences in degrees that wrongs come in. Even when the exact same right is violated, the wrong will be greater if greater damage has been inflicted. This is the familiar phenomenon of resultant moral luck.<sup>8</sup> One person might appropriate a machine that would only have sat in a warehouse otherwise; another person might appropriate a machine that, as things turn out, later became desperately needed by its owner. The latter person has violated the same right, and yet he has committed a greater wrong, as reflected in the greater remedy that is owed. The right itself doesn’t tell us the full nature of the wrong. The consequences, which are known only *ex post*, also shape the nature of the wrong.

Taking the opposite tack, it might be argued that, in fact, wrongs are binary like rights violations. According to this argument, our talk of wrongs coming in degrees is actually just a confusion. It is injuries—the harms that result from wrongs—that come in degrees, not the wrongs themselves. Someone either is or is not wronged, and then the remedy seeks to address the harms that resulted. The remedy isn’t a remedying the wrong.

The trouble with this reaction is that it disconnects wrongs from remedies—and

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<sup>8</sup> As Nagel describes it: “If someone has had too much to drink and his car swerves on to the sidewalk, he can count himself morally lucky if there are no pedestrians in its path. If there were, he would be to blame for their deaths, and would probably be prosecuted for manslaughter. But if he hurts no one, although his recklessness is exactly the same, he is guilty of a far less serious legal offense and will certainly reproach himself and be reproached by others much less severely.” (1979, p.29).

from our other moral practices and experiences. This reaction is a form of what I have elsewhere called the placeholder response. Wrongs are simply stipulated to be the placeholders where rights are violated. We can use the term in this way if we so choose, but we are still left with something unaccounted for. There is *something else* that is what we are trying to remedy (and what we blame, resent, apologize for, forgive, and so on).<sup>9</sup> My interest is this something, whether we call it the wrong or not. And this something seems to come in degrees, which makes it qualitatively different from rights violations.

#### 6.3.2 DEPENDENCE ON CONSEQUENCES FOR THE FORM OF THE REMEDY

The previous section argued that there is a qualitative difference in the internal structure of rights violations and wrongs insofar as wrongs come in degrees, which are dictated in part by the consequences *ex post*. That argument, however, is compatible with the corrective justice view that the nature of rights dictate the form that remedies should take. In this section, I mean to call this view into question as well.

As witnessed already, there is not always consensus about what remedy is appropriate as a matter of corrective justice. Insofar as Weinrib and Ripstein and the *Olwell* court all offer contradictory views about the appropriate remedy in the *Ol-*

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<sup>9</sup>This something else can't just be injury in the purely descriptive sense of harm or loss. Many losses or harms are not actionable at law and are not wrongs morally speaking either. One might say that we are remedying wrongful losses. But this only begs the question. As Weinrib (2012, pp.121-23) points out, this phrase can be understood in two different senses. If one means losses that resulted from wrongful acts, then the moral significance of this category must be explained. If one means wrongful loss in Weinrib's normative sense, then it starts to look like the rights violation.

*well* case, one might wonder which of them is correct as a matter of corrective justice. The reader already may have an intuitive opinion on this question. One might find Weinrib's approach too weak insofar as the company is forced to pay only what it would have paid if it had obtained permission, essentially ignoring the fact that it did not have permission. Or one might be inclined to think Ripstein's approach too punitive insofar as it would transfer the company's hard-earned profits, giving Mr. Orwell an undeserved windfall.<sup>10</sup>

Regardless of which reaction one has to the *Orwell* case, I want to suggest that that reaction will not be consistent across all cases. Sometimes the rental value is too weak, and sometimes disgorging profits is too strong. If this is true, then conceptual analysis of the right will not provide us with an appropriate remedy *a priori*. Wrongs include an extra element, not present *ex ante* in the right that was violated.

Consider two ends of the spectrum. First, imagine that, instead of a piece of heavy-duty, labor-saving equipment, the wrongfully used item had been merely a pencil, used to write out the business plan. No one would seriously think that, because of this wrongful usage, Orwell should be entitled to all the profits that resulted from that business plan.

At the other end of the spectrum, imagine that Orwell had owned a magical goose that would very occasionally lay golden eggs when it was caressed.<sup>11</sup> Imagine

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<sup>10</sup> In what follows, I will focus on Weinrib and Ripstein's preferred remedies. I do this for simplicity, but it should not be forgotten that the court's actual remedy is a third option, sharing some similarities to each of the others.

<sup>11</sup> If this example is too fanciful, the reader can substitute a lottery ticket or a copyright in the argument that follows. What is important is that the property's value is uncertain *ex ante* such that its actual value when put to use may significantly exceed the rental value.

that the goose only produced eggs rarely and at random, making the expected value of the goose on any given day quite low. If Orwell's magic goose were taken from him for an hour, during which time it laid a large golden egg for the thief, it would be odd to say that he is only entitled to an hour's rental value of his goose.

What varies across these examples is the relative contribution of the wrongfully appropriated item and the appropriator's efforts. In the first case, the business did all of the work, and the pencil did not really contribute to the profits. In the second case, it is reversed. The goose is the source of the profits, and the thief did not really contribute.

This contrast might suggest a principle: each party should receive the equivalent of what he or she put in. As appealing as it sounds, this suggestion ignores the fact that the inputs combine to create something new. We cannot reverse time, and we cannot say precisely the effect that various forces had in getting us to where we are. What we have *ex post* cannot be cleanly resolved into parts that represent the separate contributions of each *ex ante* input.

Consider the *Olwell* case. The company's labor combines with Orwell's machine to produce revenue. Insofar as the venture was worthwhile, the revenues will be more than sum of the value of the inputs. So we cannot simply give the value of the machine's use back to Orwell and the value of the labor back to the company, because there will still be more left over—what was *created* by the productive activity.

We might think that the surplus can also be distributed based on the relative inputs, either proportionately or entirely to the larger contributor. Thus the pen-

cil owner would get little or none, whereas the goose owner would get most or all. Something like this seems to track our intuitions: If what was wrongfully taken was the less significant input, then all one gets is the rental value; but if it was the more important input, then one gets the profits. If this were correct, then, although neither Weinrib's nor Ripstein's approach would be correct across the board, we could say *ex ante* what the rightholder should receive from the wrongful appropriation of his or her property. The nature of the right plus facts about its relative significance would tell us the appropriate remedy. The pencil owner would get only the rental value, whereas the goose owner would get the profits.

But even this principle is inadequate. Suppose that the goose was stolen, but it did not lay an egg. Should the owner receive any compensation if he sues? Most people would think that he should. His rights were violated, and he deserves something representing the fact that he was dispossessed of his property. He should not be denied any remedy just because the thief didn't profit from his crime. If a remedy is appropriate, then the natural candidate would be the rental value.

If the goose owner should get the benefits if there are some but should get a different remedy if there was no benefit produced, then it seems that the appropriate remedy for the goose owner cannot be determined *ex ante*. It depends on what the appropriation of the goose yielded. If it was fruitful, then the owner is entitled to those fruits. If not, then the owner is entitled to the rental value. One might think something similar about the *Olwell* case as well: If the company made a fortune by stealing his machine, perhaps he should get a share of that fortune. But if the venture was a complete failure, that shouldn't prevent him from getting any

compensation.

It might look like there is still an ex ante principle here: the goose owner gets either the profits or the rental value, whichever is greater. Although we might say this ex ante, it is not a principle that determines the remedy based only on what is present ex ante. Even if we fully understand the rights involved, we do not know ex ante what will appropriately compensate a violation of that right. In this sense, the content of the wrong depends on something other than the content of the right. In this way, wrongs are qualitatively different than rights.

### 6.3.3 DEPENDENCE ON HOW THE GRIEVANCE IS FRAMED

Above, I attempted to show that the appropriate remedy is not given ex ante because it depends on what results. In some contexts at least, the plaintiff would seem to be owed either the profits or the rental value of the property, whichever turns out to be greater. But even this description, I believe, ignores an important way in which the appropriate remedy depends on something ex post. In this section, I mean to point out another way in which the remedial question is dependent on the ex post context: it depends on how the plaintiff frames his or her complaint.

Normally, if one has a choice between two amounts of money, one will choose the greater sum. So, where a plaintiff can seek either profits or rental value, we can normally expect the plaintiff to seek the greater amount. But the appropriate remedy isn't actually dependent on which amount turns out to be greater. Rather, it depends on what remedy the plaintiff requests, which in turn depends on how the plaintiff frames his or her complaint.



This point is clearest when the possible remedies are not both fungible, monetary values. Imagine that an employer makes an employee work extra hours on a project outside the scope of the employment contract. The employee comes up with an innovative idea, which the employer promptly patents.

We can imagine the employee seeking either compensation for his uncompensated hours of labor or seeking ownership of the patent. These represent different forms of complaint against the employer. One is a complaint that one didn't get paid; the other is a complaint that one's idea was stolen. The same set of facts could be basis for either grievance. It depends on how the employee perceives or frames the wrong.

In this sense, the appropriate remedy depends on the choice of the employee, which need not correspond with greater economic value. The employee might elect to seek lost pay rather than the patent itself, even if that is worth more. Perhaps he does not want to jeopardize his employment relationship with the company. Or perhaps he is not interested in having to license and police the patent himself. On the other hand, an employee might seek the patent, even where its market value was less than the wages would amount to, if he was particularly attached to its being *his idea*.

What these possibilities show is that a plaintiff doesn't simply receive (if successful) whichever remedy is greater. He receives the remedy that he elects to seek. Put another way, the appropriate remedy depends on how the complaining party frames the complaint. The remedy, that is, depends in part on how the victim perceives the injury. This is necessarily determined *ex post*. We may be able to

speculate *ex ante* about how some action is likely to be regarded—what the complaint will probably look like—but it is the way that it is actually regarded—what the complaint actually is—that matters. This is a third way in which the remedial question depends on something *ex post*, not simply on the nature of the right *ex ante*.

Corrective justice theorists—Weinrib chief among them—rightly criticize non-corrective accounts of tort law for not capturing the character of private law that involves doing justice between the parties.<sup>12</sup> They claim that one cannot understand the privateness of private law without appreciating the bipolarity of corrective justice. I think that there is much to be said for this criticism.

But it is not true that non-corrective views have no conception of private law. As one writer puts the point, “[p]rivate law is structured as a drama between plaintiff and defendant” (Dagan, 1999, p.147). What makes private law private, in such view, is the structural fact that it adjudicates complaints of one party against another party. The distinctive character of private law comes from the structure of relying on private complaints. In private lawsuit, one party makes a complaint against another. This is, in a sense, an assertion that “you have done me wrong.” The defendant, then, is put in a position of responding to this complaint. Private law doesn’t actually respond to rights violations *per se*, but rather to the complaints that we make against one another. In this way, private law is about the relationship

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<sup>12</sup> For example, Weinrib writes, “Presenting corrective justice as a quantitative equality captures the basic feature of private law: a particular plaintiff sues a particular defendant. Unjust gain and loss are not mutually independent changes in the parties’ holdings; if they were, the loss and the gain could be restored by two independent operations. But because the plaintiff has lost what the defendant has gained, a single liability links the particular person who gained to the particular person who lost.” (1995, p.63).

between the parties not just in its content, as Weinrib would have it, but also in its structure.

This is where Weinrib's account of the *Olwell* case goes awry. Weinrib suggests that the only question for the court concerned the nature of the right that was violated. But more immediately, the appropriate question concerned whether Olwell's complaint was a successful one. Olwell's complaint, put simply, was as follows: "You wrongfully stole the benefits of my machine—you owe them back to me." One might say, in this sense, that he addressed a complaint more in the spirit recommended by Ripstein.<sup>13</sup> As the court notes, he might have made a different complaint. For example, he might have said essentially, "You stole the use my machine—you owe me the cost of using it," which would have been the complaint Weinrib imagines. But the former, not the latter, is the complaint that he elected to make in light of the facts available *ex post*. In a different context, he might have made the latter complaint rather than the former.

The question, then, is whether the egg company can rebut the complaint that is made against it. Put simply, the question is whether the company can respond, "No, these benefits are rightly ours." This response wears its difficulty on its sleeve. The company cannot make this claim; from their mouth it is implausible. The court's opinion makes precisely this point: "However plausible, the appellant *cannot be heard to say* that his wrongful invasion of the respondent's property right to exclusive use is not a loss compensable in law."<sup>14</sup>

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<sup>13</sup> This statement must be qualified. Although Mr. Olwell sought disgorgement, as Ripstein thinks appropriate, he did not seek disgorgement of profits.

<sup>14</sup> 26 Wash.2d at 286 (emphasis added).

The *Olwell* decision is also attentive to the complaint-based character of private law—to how the parties framed the dispute—in another way. Mr. Olwell could not be given more than he sought. Olwell’s complaint was essentially “you owe me \$900.” It was therefore judged to be an error for the trial court to say, “He’s right, you owe him \$1,560.” The court was limited by how the parties frame the dispute.

The structural dependence on how the parties litigate the dispute—that is, on how the grievance between the parties is framed and rebutted—is an important way in which the remedial question is not just transparent back to the right that was violated. It is based on that distinctive feature of private law as involving with one party addressing another party. These addresses are necessarily made *ex post*. And they demonstrate an important way in which remedies, and the wrongs that they remedy, are necessarily *ex post*.

The fact that private law turns on how parties actually make and respond to a complaint might be taken to show that wrongs and remedies come apart after all.<sup>15</sup> And, in part, it does. Whether one has been wronged does not depend on one’s choice to make a complaint. One is wronged irrespective of whether one complains against the wronging party. One might even be wronged without even knowing about it.

My claim, however, is that one is wronged when, in some sense, one *has* a complaint, i.e., when one *could* complain. This can be the case, I believe, even where one is not disposed to raise the complaint or where one is altogether unaware of the

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<sup>15</sup> I am indebted to Gina Schouten for pressing me on this point.

complaint that one has. Recall the analogy with medical remedies. We, of course, do not think that one has an ailment only when one is attempting to treat something. But it is the case that to have an ailment is for there to be something that one could, in theory, seek to remedy. In the same way, legal remedies reflect wrongs, not in the sense that wrongs only exist where we recognize a legal remedy but in the sense that wrongs exist where one could, in theory, seek a remedy.

My argument in this section has aimed to suggest that the nature of one's complaint depends, in part, on one's framing of the issue. And, in this way, I believe that the wrong suffered depends on facts about how the wronged party does or would view the issue. For example, the wrong done to the employee whose work has been taken without compensation depends on how he would view the issue. This thought is compatible with the idea that he is wronged even if he is not disposed to make any complaint or is not even aware of the transgression. But it is not compatible with the idea that wrongs correspond simply with the *ex ante* right that was violated.

#### 6.3.4 SUMMING UP: THE UNAVOIDABLE AMBIGUITY IN COMPENSATION

We typically think that compensation means giving back to a wronged party whatever was taken from him or her. We speak of making someone whole. In this picture, the wrong is the void that must be filled. It is as though a piece of a puzzle has been removed and just needs to be put back in. What to put back is the same thing that was there before it was removed.

But matters are not quite that simple. Things look different at one time than

they do at another; events change things. Repairing a puzzle is not straightforward when the pieces can merge and morph. One is not just trying to return whatever was there before. Instead, repair must involve something new, which is based both on what was there before and on how things look now.

Wrongs have this character. They may arise from the fact that a right has been taken from us, but their shape is not determined only by the shape of the right that was taken. It also depends on the context *ex post*. That is, the nature of a wrong depends on certain facts that only come into existence once the wrong is committed. These include facts about the losses of the wronged party, the benefits derived by the wrongdoer, and the wronged party's interpretation of his or her injury.

The *Olwell* case presents a pointed version of these features because there are so many ways to conceptualize what was taken from the machine owner by virtue of the wrongdoing. But the same pattern is visible in simpler cases. As I noted at the beginning, a wronged promisee might be compensated by putting her in the position she would have been had she never received a false promise or by putting her in the position she would be in had the promise been carried out. Which of these better characterizes the wrong done to the promisee will depend on what the consequences have been and on how the promisee herself views the injury.

As a result, we cannot say that a wrong is simply equivalent to the *ex ante* entitlement that was violated. Wrongs have their own distinct character that depends on their *ex post* context. This is not to deny that the two bear on one another. But wrongs are not just the conceptual antipode to rights. Wrongs—as viewed

through the remedies that they demand—are also a function of context and consequences.

## 6.4 NON-CORRECTIVE ACCOUNTS

I HAVE, AT THIS POINT, fully laid out the argument of this chapter. The argument relies on two claims. First, remedies reflect the character of the wrong that they are addressing. This premise, I suggested, is supported by the basic idea that remedies are corrective. Second, remedies depend on the context *ex post*; they are not entirely determined by the nature of the right that was violated. This claim was illustrated by contrasting similar rights violations that nevertheless yield different situations *ex post*. These two claims generate my conclusion: The character of a wrong is not entirely determined by the nature of the right that was violated.

In this section, I want to return to the first premise and consider two conceptions of the law that deny it. Although I will hint at some sources of my disagreements with these views, my aim is not to refute them here. Rather, my hope is to use this discussion to clarify my own argument by way of contrast.

### 6.4.1 REMEDIES AS PUBLIC POLICY

Many theorists will think that remedies serve multiple purposes, and that, for that reason, we cannot simply read the appropriate remedy off the right that was violated. Faced with the various remedial possibilities, it is natural to think that the choice between these different remedies is a public policy question—a question about what legal institutions we, as society, should prefer. Because the existence of

a rights violation leaves open various ways of responding to that violation, we are left with a choice. What we choose will be based on how we weigh various societal values.

Hanoch Dagan has described the variety of competing values in the context of the *Olwell* case. A profit-based remedy will strongly deter appropriation and thereby vindicate the libertarian values of control over one's property. A market-value-based remedy vindicates the utilitarian maximization of well-being. A harm-based remedy will encourage sharing as long as it is not harmful, thereby serving the values of altruism. (Dagan's own positive account is closest to this latter view; he would encourage interpersonal trust and sharing by dividing the efficiency gains between the two parties.)

It is important to note that Dagan's view does not deny that the remedy is necessarily bound up with the nature of the entitlement that was violated. But he views the choice of remedies as itself shaping the ex ante entitlement. In his words, the choice among remedies is a "distributive choice" (1999, p.153) about what form of entitlements to protect, and "[t]he doctrinal choice among its multiple configurations is in itself implicated in—and is a construction of—social values" (1999, p.153, p.149).

For Dagan, which remedy the court awards *Olwell* will determine what *Olwell*'s property right actually involved. As he puts it, "Property is an artefact, a human creation that can be, and has been, modified in accordance with human needs and values. Property is an essentially contested concept that is open to competing interpretations and permutations" (1999, p.148). In short, the nature of the right



itself is still up for debate; that's what we are deciding when we decide the remedial question.

As appealingly pragmatic as it sounds, this public policy view does not take seriously the *ex post* nature of the remedial question. Certainly it is true that we might shape our legal institutions in a variety of ways and that there is a choice between competing values involved. Prospectively, we might decide to vindicate any number of social aims. This *ex ante* choice, however, is traditionally a matter for a legislature.

The *Olwell* court, however, is not a legislature. It is there to adjudicate a dispute between two private parties, one alleging that the other has violated his rights. Dagan's claim that the court ought to assess "the *ex ante* entitlements" through "a public lens" is incompatible with the idea of doing justice between private parties. In this sense, it is incompatible with a conception of private law as fundamentally about correcting wrongs, without reference to external aims like deterrence or efficiency.

So, the public-policy-oriented explanation of remedies like Dagan's comes with two clear costs. First, it requires that we abandon the idea that private law is distinctively about justice between the parties. Second, it does not capture the sense that private law is intrinsically *ex post*—that it presupposes a set of established rights and is concerned exclusively with responding to their violation. Given these costs, I think that we should hope for a different way to understand the private law.

But, it is worth noting that I am in some agreement with the criticism that the public-policy approach levels against traditional corrective justice theories. The

public-policy approach emphasizes that, as long as the ex post remedial question is inexorably tied to the ex ante question about rights and duties, our remedial choices will have a regulatory character.<sup>16</sup> I do not entirely disagree. I simply believe that this should press in favor of distinguishing between these questions.

#### 6.4.2 CIVIL RECOURSE THEORY

It is not necessary to abandon the idea that private law responds to rights violations in order to question the corrective justice approach. An intermediate position is available if one accepts that rights violations are the touchstone for legal liability without simultaneously accepting that rights violations dictate the form that that liability will take. Such a position has recently been defended under the label of civil recourse theory.

Civil recourse theory relies upon on the idea that I have been emphasizing: legal remedies do not derive simply from the nature of the right that was violated. In this respect, my argument echoes arguments that have been made by civil recourse theorists. Like I have, civil recourse theorists emphasize the complex questions involved in awarding remedies and the gap that this creates between the rights violation itself and the remedy. They also emphasize the way in which remedies depend on the response of the wronged party. In short, they agree that remedies do not just derive from the right that has been violated.

These points lead civil recourse theory to view legal remedies as responding to

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<sup>16</sup> This argument is developed nicely in Fried (2012). I agree with Fried that it is a mistake to think that answering the “compensation question” indirectly involves solving the “prohibition question.” My argument, in a sense, is that the gap between these questions reveals the difference between wrongs and rights violations.

wrongs but not necessarily as correcting or repairing them. Civil recourse theory conceives of private law as empowering individuals with a structured way to react against those who have wronged them. It provides a legal recourse—a constrained, legally sanctioned channel for retaliating when we are wronged. Being wronged is the prerequisite for legal recourse, but the recourse isn't necessarily repairing the wrong. As one writer puts it, "The courts in tort law do not stand ready to facilitate the rectification of wrongdoing, or to restore a normative equilibrium, as corrective justice theorists maintain. Instead, they empower individuals to obtain an avenue of recourse against other private parties." (Zipursky, 2003, p.755) What recourse the state permits is shaped by various considerations, some involving compensation and others not.<sup>17</sup>

If civil recourse theory is correct, then legal remedies aren't actually remedies at all. They respond to wrongs, but they don't correct them. In this way, civil recourse theory is a rejection of the premise with which I started, namely, that remedies are corrective. I consider this to be a significant theoretical cost. I take it to be a central and attractive aspect of private law that it aims at restoring justice where injustice has been done. There is something that our legal remedies are trying to redress.

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<sup>17</sup> This feature of civil recourse theory creates some ambiguity, which has been the source of criticism. Arthur Ripstein, for example, argues that civil recourse faces a dilemma: either the recourse available is shaped by the nature of the obligation that gives rise to the action, in which case the theory collapses into corrective justice, or the recourse is not shaped by the obligation, in which case the theory defends mere revenge or instrumentalism. As he puts it: "With respect to what we might call the narrow principle of civil recourse, according to which plaintiff has a power to enforce a right, civil recourse is not merely consistent with, but required by, corrective justice... [T]he attempt to distinguish a more ambitious idea of civil recourse, understood as domesticated anger and retaliation, must fail. Not only does it fail to integrate with the relational nature of duty; it also falls into the very sort of functionalist instrumentalism that pragmatic conceptualism sought to leave behind." (Ripstein, 2011, p.203).

This can be felt in the way that we search not just for a *permissible* response, but for *the appropriate* response. The civil recourse theory gives up the idea that remedies are measured specifically to match the wrong.

#### 6.4.3 MAPPING THE THEORIES

I want to close by suggesting that both non-corrective accounts of private law and the existing forms of corrective justice theory both fail to account fully for the ex post nature of private law, albeit in two different ways. In this sense, the separation of wrongs from rights that I am advocating can be represented as taking seriously the ex post character of wrongs in two respects (which correspond with the two premises of this chapter's argument).

On the one hand, corrective justice theory correctly appreciates that private law seeks to remedy wrongs. Private law is, in this sense, inherently backward-looking. The remedial question is ex post in that it occurs against the backdrop of a preexisting transgression. Contrary to public-policy-oriented views, we cannot use it as an opportunity to go back and reshape our ex ante entitlements. Nor can we view the remedial question as merely a choice about how best to move forward, untethered from the shape of the transgression that triggered it. So, in my view, corrective justice properly views the private law as aimed squarely at remedying wrongs.

On the other hand, I have argued that remedies do not correspond simply with the right that was violated. There is a gap between rights and remedies where other factors intervene. In this sense, I share the view of the civil recourse theorists. But I locate this gap at a different place in conceptual space. The difference might be

represented this way:

Corrective Justice:	remedies	<i>reflect</i>	wrongs	<i>reflect</i>	rights
Civil Recourse:	remedies	<b><i>do not reflect</i></b>	wrongs	<i>reflect</i>	rights
My View:	remedies	<i>reflect</i>	wrongs	<b><i>do not reflect</i></b>	rights

**Table 6.1:** Corrective justice and civil recourse

Wherever it is positioned, this separation between rights and remedies involves an appreciation that remedial questions cannot be analyzed only in terms of ex ante entitlements. As such, it represents an understanding that remedies involve an ineliminable ex post component.

Combining these two points, I conclude that wrongs have an ex post character that qualitatively distinguishes them from rights. This is the central argument of this chapter. We can now represent this argument in relation to the other existing views in table form:

	Remedies correspond with an underlying right	Remedies depend on other factors
Remedies aim to correct a wrong	Traditional Corrective Justice Theory	My View
Remedies represent a policy choice	Public Policy Views	Civil Recourse Theory

**Table 6.2:** Four views of remedies

Like corrective justice theory, I believe that remedies aim to correct a wrong. Like civil recourse theory, I believe that remedies depend on factors beyond the nature of the underlying right. These independently plausible ideas can be main-

tained simultaneously by thinking that the nature of a wrong depends on more than the nature of the right violated.

*[The psychopath] is socially dissimilar from the majority of his fellows in his lack of moral feeling, by his failure to be motivated by a recognition of the rights of others and the obligations he has to them. Thus, he is in no position to claim rights for himself. He violates a condition for the possibility of reciprocity which is... in turn a presupposition for intelligibility of the whole obligation-rights language game... If this is so, of course, then the psychopath cannot be wronged, can be done no moral injury.*

Jeffrie G. Murphy

*Horses, just like dogs and other animals, have sensitive feelings, only they cannot complain when they feel hurt as we can. So it happens that a great many people do not understand that they can have feelings like our own.*

Edwin Kirby Whitehead

# 7

## An Argument from Standing & Capacity

NOT ALL VICTIMS CAN COMPLAIN. In the previous chapter, I noted that the nature of a wrong may depend on how the injured party frames his or her complaint. But some parties can't frame a complaint at all. This chapter argues that one gap between the ex ante realm of rights and the ex post realm of complaints exists because having a complaint requires not simply that a right be violated but also that

one be in a position to complain. Merely having a right violated does not automatically give mean that a party can hold the violator accountable. As a result, a party can be owed obligations from others and yet not be in a position to complain if the obligations are not fulfilled.

I will consider two different ways that one might be unable to complain against a rights violation and yet still be a rightholder. First, one might lack standing where one's own conduct prevents an appeal to the relevant norms. Thus the psychopath imagined by Murphy (1979, pp.134-36)—as well as the more ordinary moral transgressor—may lack the standing to complain when the norm that he has himself flouted is not followed. Second, one might lack the capacity to hold others accountable. Nonhuman animals, I will argue, fall into this category. Although I will suggest that we should view them as having rights, they lack the capacity for issuing complaints or holding us to account. These two general types of cases—if my interpretation of them is accepted—present a substantial difficulty for any view that necessarily links the obligations that we owe to others with the possibility of moral complaint. It is with some remarks on such a theory that this chapter begins.

## 7.1 DARWALL, WALLACE, AND MORAL STANDING

THERE IS A COMMON IDEA that, in order to be a rightholder, one must be the kind of entity that has standing to make claims and complaints. This idea is sometimes offered as a conceptual truth. Consider one fairly typical example:



To violate a right is to wrong the holder of the right. It is to fail to do what is owed to the right holder. That indicates that someone or something can hold rights only if it is the sort of thing to which duties can be owed and which is capable of being wronged. In other words, moral standing is a precondition of right-holding. (Jones, 1999, p.362)

A special kind of standing—the standing to be potentially wronged—is taken to be a precondition for being the bearer of relational duties, i.e., a precondition for being a rightholder. One might even think that the relational duties are, in some sense, based on the existence of this standing.

In this section, I want to examine this conception of moral standing. The lens for this examination will be some criticisms of Stephen Darwall's second-personal account of morality that have been raised by R. Jay Wallace. Wallace's criticisms are helpful, challenging the connection between moral norms and the complaints of others. Ultimately, I will suggest that Darwall can withstand the wedge that Wallace attempts to drive here. But seeing how Darwall can withstand these criticisms points the way to further issues. Although the gap that Wallace tries to exploit is not there, a similar gap might be.

According to Stephen Darwall, morality is importantly “second-personal.” By this, Darwall means that our moral obligations are owed to particular persons—unlike general directives—in that they are based on reasons that one person gives to another.<sup>1</sup> What is important, for Darwall, is the idea that we can generate reasons for each other—we can direct each other practically, by making demands directly upon our will, rather than just epistemically, by pointing out relevant nor-

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<sup>1</sup> In his terms, the second-person standpoint is “the perspective you and I take up when we make and acknowledge claims on one another’s conduct and will” (2009, p.3).

mative facts.

Second-personal reasons depend on the possibility of addressing one another in a special, reason-giving way. That is, the duties that we owe to one another depend, for Darwall, on a relationship of authority. “When someone attempts to give another a second-personal reason, she purports to stand in a relevant authority relation to her addressee” (2009, p.4). This relevant authority amounts to a kind of standing. As Darwall puts it, “when you demand that someone move his foot from on top of yours, you presuppose an irreducibly second-personal standing to address this second-personal reason” (2009, p.13). In other words, the directed—that is, the second-personal—quality of moral reasons derives from the existence of authority between the persons involved, which, in turn, depends on a standing to make demands and hold accountable.

There is plenty of room for doubt about Darwall’s picture. How the existence of certain modes of address can give rise to a special type of reason is not obvious. For this reason, Darwall’s theory can feel quite elusive. A recent paper by R. Jay Wallace presses these questions about how the ideas of address and authority are supposed to be related to moral norms. The main thrust of Wallace’s argument is that it is not clear how the authority of second-personal address, which seems to depend on an act of the addressor, can be the basis for moral norms, which do not seem to be similarly contingent. He begins by correctly noting a peculiar feature of the gouty toe example:

As Darwall initially develops the example, the victim’s protest is lodged after the point at which pressure is applied by your foot to the gouty toe. This has puzzling consequences, if we take seriously the idea that

it is the addressing of a claim or demand that is the source of distinctively second-personal reasons. The claim or demand that is at issue in this case is the victim's protest, which we should understand as creating a reason for you to desist, in virtue of the victim's authority to make demands of precisely this nature. This suggests that you did not have a second-personal reason to refrain from stepping on the victim's toe until the protest was issued. This cannot be right, however. Surely we want to say that you have an agent-relative reason not to step on someone's gouty toe that is (to some degree) prior to and independent of any complaint that might be issued after the toe has actually been stepped on. (2007, p.26)

This observation highlights an important difference between moral reasons, and the agent-relative reasons that typically derive from orders or demands made with proper authority. The soldier does not have a reason to march until the order is given, and, in that sense, the address of the order creates the reason. But moral reasons are not like this. The reason not to step on the gouty toe is not created by the protest; it was there all along. For Wallace, this fact calls into question the "voluntarist" element of Darwall's account, according to which second-personal reasons are "claims on the will of an agent that are grounded in another agent's authority to issue claims of the relevant kind" (2007, p.27). If the reason exists antecedent to second-personal address, then it doesn't seem like the reasons come from the exercise of authority as Darwall suggests. Notice that Wallace's point turns on the seeming gap between the moral norm, which exists *ex ante*, and the protest of the victim, which only exists *ex post*.

Of course, it is not as though Darwall has entirely missed this point. He writes, "Moral obligations involve implicit demands that are 'in force'... even when actual individuals have not explicitly made them" (2009, p.290 n.22). His idea is that the

moral accountability involves taking there to be unarticulated demands that obtain at all times. Much like criminal punishment for an action implies an antecedent legal norm against such action, holding one another accountable morally implies an antecedent moral norm. As he puts it:

[T]o understand moral obligation as related to moral responsibility in the way we normally do, we have to see it as involving demands that are ‘in force’ from the moral point of view, that is, from the (first-person plural) perspective of the moral community... Once... we have the idea that there exists a reason to forbear stepping on people’s feet in the fact that this is something we can or do reasonably demand of one another, or that we are accountable for this forbearance, we have the idea of a second-personal reason—a kind of reason that simply wouldn’t exist but for the possibility of the second-personal address involved in claiming or demanding. (2009, p.9)

Wallace, I think, misinterprets Darwall’s argument here. He interprets Darwall to be making a claim about the disposition of the other agent or the moral community to hold us accountable. He writes:

Even if the demand is not explicitly addressed by the person whose toe you step on, it is present in the disposition of that person—together, perhaps, with other members of the “moral community”—to respond to certain things you might do with resentment, indignation, and other such emotional reactions. This maneuver, if I understand it, involves an expanded conception of what it is to address a demand to a person. On the expanded account, demands are addressed not merely when they are explicitly articulated (in the form, say, of a command or a protest) but also when there is present a disposition to respond to violations of implicit norms or standards with the reactions characteristically associated with accountability and blame. (2007, p.27)

In other words, Wallace interprets Darwall to be claiming that the moral norms are implicit in the disposition to hold accountable.

Wallace argues that such a view is inadequate, and for good reason. As he points out, just as our moral norms do not require actual issuance of commands, neither do they require any actual disposition to hold accountable. “Your reason not to step on the gouty toe of your neighbor... seems equally independent of whether the victim, or anyone else, is in fact disposed to respond to your treading on his toes with resentment, indignation, and similar accountability reactions” (2007, p.27). Wallace is correct that morality cannot depend on such contingencies. So it would be inadequate for Darwall to appeal to any disposition to hold accountable as underwriting the demands of morality.

But I don’t believe that Darwall should be interpreted as appealing to any disposition to hold accountable. What is important is not that the gouty neighbor does protest (explicit demand), nor that he would protest (disposition), but that he *could* protest.<sup>2</sup> He could hold you accountable, i.e., he could blame or resent your stepping on him, and implicit in such an act of holding accountable would be the presence of a command that you not step on his foot. Notice that the ‘could’ here is not just a description of ability. Speaking descriptively, he could resent you for not having gout yourself. But such resentment would be unfounded or inapt. When we say that he could resent your stepping on his foot, we mean not only that

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<sup>2</sup> Note the use of ‘can’ and ‘accountable’ (also a term of possibility) in the following already quoted passage from Darwall: “Once...we have the idea that there exists a reason to forbear stepping on people’s feet in the fact that this is something we can or do reasonably demand of one another, or that we are accountable for this forbearance, we have the idea of a second-personal reason—a kind of reason that simply wouldn’t exist but for the possibility of the second-personal address involved in claiming or demanding” (2009, p.9).

it would be possible but also that such resentment would be apt.<sup>3</sup>

To recognize that he could hold you accountable *in this sense* is already to recognize the presence of a second-personal reason. This, I think, is the idea behind Darwall's argument—the authority of the other person is present in the potentiality of their legitimately holding you accountable. This is why Darwall appeals throughout the book to the concept of 'standing,' a term that is almost entirely ignored in Wallace's treatment. As Darwall puts it, "I... argue that moral obligations essentially include demands free and rational individuals have standing to make of one another as such and that we are committed to the standing to make these demands by presuppositions of the second-person standpoint" (2009, pp.28-29). In sum, the demands of morality aren't demands that are explicitly given, nor are they implied by an actual disposition to hold accountable, but rather they are implicit in our standing to hold each other accountable—they are implicit in the fact that we *could* hold each other accountable.<sup>4</sup>

Now admittedly, it's not self-evident how the possibility of legitimate future protest implies an already existing command, and one does wish that Darwall had said a bit more on the matter. I could potentially make a valid protest against my roommate eating bananas at his desk, the smell of which makes me nauseous, but this fact doesn't imply a command that he not eat bananas when I have never said anything.

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<sup>3</sup> In what follows, I will generally use 'could' in this stronger sense, implying not only physical possibility but also a nonphysical possibility or aptness. Where context is ambiguous, I will sometimes refer to what a person 'could legitimately' resent or complain against. This sense of 'could' is essential to the idea of standing.

<sup>4</sup> Gilbert (2004) similarly suggests that the directedness of obligations exists in a special standing to complain.

Still, there does seem to be a difference between protests of this sort, which faultlessly comment on past action in order to request its alteration in the future, and complaints of the reactive-attitude sort, which more clearly presuppose a pre-existing norm. The analogy to punishment is a helpful one. A statute that authorizes punishment for a certain act without explicitly specifying a prohibition can nevertheless implicitly command citizens that the act is not to be done. And this implicit command is still in force—one still has a legally given reason not to do it—even if the state entirely lacks any disposition to prosecute the act. I suspect that Darwall would find an even more felicitous analogy in private law—tort law, contract law, and so on. In private law, the law rarely issues commands. Contract law, for example, does not explicitly say (insofar as it ‘says’ anything) that one must fulfill one’s contracts. Instead, it says that if you do not keep fulfill your contracts, then those with whom you have contracts may demand damages. Nonetheless, we ordinarily view contract law as containing norms that govern contracting. One might plausibly think that one has a legal reason to fulfill one’s contract—and this is true even if one know the other party is not disposed to sue. The standing to sue that is granted to contracting parties presupposes, as it were, the existence of corresponding commands.<sup>5</sup> Similarly, the standing to make moral complaints, I am suggesting, could plausibly be taken to presuppose implicit commands.

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<sup>5</sup> Although I appeal to this common understanding of private law to explicate Darwall’s view, I actually believe that this understanding of private law is mistaken, precisely because it involves an unwarranted inference from complaints and wrongs to norms.

Wallace agrees that morality involves relational duties, and he accepts that accountability and resentment typically go along with these duties.<sup>6</sup> What he rejects is that reactive attitudes and accountability can be their source. Holding each other accountable may be characteristic of relational norms, but it is not the case that holding one another accountable implies or draws us within relational norms.

Wallace's argument that the possibility of reactive attitudes does not presuppose relational norms is that reactive attitudes like guilt and indignation can exist without relying on relational norms.<sup>7</sup> For example, one can feel indignation towards Robert Mugabe without thinking that he violated any norm owed to you. But it is not clear that Darwall needs every reactive attitude to correspond with a particular relational norm. The point that Darwall wants to make, what he calls Strawson's point, is that reactive attitudes presuppose a realm of second-personal reasons.<sup>8</sup> This does not require that each reactive attitude will involve an isomorphic relational obligation; all that it requires is that a realm of relational duties is presupposed. A victim's resentment of Mugabe does seem to presuppose the idea

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<sup>6</sup> For example, he writes, "[I]t is characteristic of relational normativity, as I understand it, that the person who is wronged by you has a privileged basis for complaint against you, an objection to your conduct that is not shared by mere observers to what was done. The notion that someone in particular has been wronged by your action is conceptually connected to the idea that the wronged party has special ground for complaint, which typically takes the form of resentment and the kind of personal protest that gives expression to this reactive sentiment." (2007, p.29).

<sup>7</sup> As he puts it, "It is not the case, however, that the expectations implicated in these attitudes are specifically relational norms, linking the bearers of the attitudes to their targets in a bipolar normative nexus" (2007, p.30).

<sup>8</sup> "Reactive attitudes invariably concern what someone can be held to, so they invariably presuppose the authority to hold someone responsible and make demands on him. Moral reactive attitudes therefore presuppose the authority to demand and hold one another responsible for compliance with moral obligations (which just are the standards to which we can warrantably hold each other as members of the moral community)." (2009, p.17).



that he did something he owed it not to do.<sup>9</sup> Our detached indignation may simply be, as Strawson described it, “the vicarious analogue of resentment” (1962, p.15). Darwall’s claim is that, overall, being able to hold another accountable presupposes a special kind of reasons. I don’t see that Wallace really challenges that claim.

Although I think that Wallace’s criticisms of Darwall are ultimately unsuccessful, I do think that they are helpful. Wallace rightly draws our attention to the temporal slide in Darwall between complaints and attitudinal responses that happen (if at all) in the future and moral norms that seem to be ever present. This gap between complaints and norms emphasized in Wallace’s argument suggests a different set of objections to Darwall, one that retains something of the spirit of Wallace’s criticism. Wallace focuses on those who *have not*, or *would not*, complain against a particular transgression, and I have argued that Darwall’s view may be able to answer these cases. Explaining these examples highlights the fact that Darwall isn’t linking moral norms with actual complaints, but with the standing or capacity to complain.

What we need in order to challenge Darwall’s view is to consider those who *could not* complain against a transgression—those who are not in a position to address us second-personally. If relational morality exists where a party lacks even

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<sup>9</sup> Wallace seems to recognize this. He writes, “Among the reactive sentiments, resentment may be a special case, presupposing that one stands in a relational nexus of the kind I have been discussing. We feel resentment when we believe that another person has wronged us, violating a directional duty to us not to treat us in certain ways; resentment, indeed, can be understood as the characteristic form of complaint that bearers of relational rights and claims are in a privileged position to lodge when those rights and claims have been flouted. But these features of resentment hardly generalize to all of the reactive sentiments across the board.” (2007, pp.30-31). It’s not clear why this unique character of resentment that Wallace grants isn’t enough to get Darwall his argument.

the standing to complain, such cases would reflect the general idea that Wallace endorses: the practical authority that inheres in having the ability to hold accountable is merely characteristic of, rather than the basis of, relational normativity. Instances of relational norms without the ability to hold accountable would show that accountability is only characteristically connected to relational morality—as opposed to the stronger, foundational connection that Darwall posits. Cases of this sort are the subject of the next two sections.

## 7.2 LACKING THE STANDING TO COMPLAIN: NORM VIOLATORS

IN THE PREVIOUS SECTION, I ARGUED that Darwall is most plausibly understood as thinking that the moral norms are implied by the fact that another *could* complain, not by the fact that the other person does or would complain. The possibility of such second-personal address presupposes the existence of second-personal reasons. On this view, our moral authority is captured by a kind of standing that we have with regard to each other. In this section, I intend to present a difficulty for the thought that moral obligation is based on this sort of standing.

Although the difficulty presented is particularly applicably to Darwall's view given his focus on the way we address each other, I think that it presents a more general difficulty for theories of relational normativity such as that described by Michael Thompson and drawn upon by Wallace. This is because, although such theories may not focus on the standing to complain in the way that Darwall does, they do emphasize a similar sort of standing. On such views, relational norms are characterized by the fact that there is someone in particular who stands to be

wronged by their violation.<sup>10</sup> One might say that standing to be wronged plays a similar role in such views as the standing to complain does in Darwall. Thus, although the argument of this section is most directly relevant to Darwall's view, I take it to present a broader reason for doubting the necessary connection between wronging and relational duties.

#### 7.2.1 THE STANDING OF MORAL TRANSGRESSORS

The difficulty arises from a special way in which a party may lack standing to complain about the violation of a norm. Ordinarily, someone lacks standing to complain when the action in question is not her business—such as, if she has no particular interest at stake in the matter and she is not owed any particular duty with regard to the action. But there is another way that someone may lack the standing to complain, which does not involve being a disinterested party. This happens when someone has rejected a particular norm, usually through action but possibly only through speech.<sup>11</sup> As John Rawls puts it, “A person's right to complain is limited to violations of principles he acknowledges himself. A complaint is a protest

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<sup>10</sup> See, e.g., Wallace (2007, p.28): “Your obligation in this matter has a similarly relational aspect; it is an obligation to the gout victim not to disregard his well-being, and its violation would not merely be something that is impersonally wrong or incorrect, but an act that wrongs the person who is thus made to suffer.”

<sup>11</sup> Trained lawyers are sometimes confused by the use of the word ‘standing’ in this context. In law, standing has a narrow meaning, which refers to whether parties must a relevant interest in the disputed controversy. Since transgressors undoubtedly retain an interest in what is done to them, this use of the word may make it awkward to speak of losing legal standing by virtue of one's own misdeeds. But I believe that this is a peculiar feature of the legal usage. In general, to challenge the opposing party's standing is, essentially, to pose the question, “What is it to you?” It is a feature of this challenge that it can be used either to demand what interest the other party has at stake or to demand what basis the other party has for availing itself of the relevant norm. Thus, although lawyers do not typically use the word in this way, it seems to me best to think of the doctrine of unclean hands as an equitable standing doctrine.

addressed to another in good faith. It claims a violation of a principle that both parties accept.” (1999, pp.190-91). What counts as acknowledging a principle is a tricky questions, but when one entirely flouts a moral norm, it may become the case that one cannot legitimately appeal to that norm as the basis for a complaint against another.<sup>12</sup>

Consider an example. You are in a bar discussing sports and you happen to make known your opinion that Arsenal’s team is a bunch of whiners and cheats. The hothead at the stool next to you, who may have had a pint or two too many, immediately lands a right hook to your chin. Suppose that the right thing to do is to turn the other cheek. But you give in to your temptation and retaliate with a swing of your own. Ex hypothesi, you have acted wrongly. Your grandmother at the other end of the bar has every reason to be appalled by your behavior.

But I do not think that the guy who hit you first can legitimately complain that he has been wronged. By striking you, he has surrendered his position to complain about an analogous wrong done to him in response. Consider how ridiculous it would sound for him to suddenly say, “you have wronged me by punching me—I demand your apology for this act of unnecessary violence.” This is not, of course, to say that he has lost all standing to complain about anything. If you had escalated the conflict by throwing a grenade instead of a punch, he would certainly be in a

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<sup>12</sup> For useful discussion of this idea, see Cohen (2006); Cohen (2013). In order to avoid what may seem like counterexamples to this principle, it is worth distinguishing between cases in which one appeals to the norm, and cases in which the existence of the norm figures in one’s complaint. There may be a particular norm that I do not accept but which I know to be accepted by those around me. If they violate that norm, it may express a disrespect for me or it may frustrate my expectations. In such situations, I might complain. But I would not be appealing to the norm itself. I would be appealing to other norms about respect or reliance. The norm would figure only as a descriptive fact about social conventions.

position to complain about that. And he might yet be in a position to complain about your insensitive insults to his favorite team. But he cannot, I think, complain about receiving a punch in response to his own punch.<sup>13</sup>

There are interesting and complicated questions about the scope of standing that is lost when one violates a norm: How proximate must the violations be to each other? When does one regain one's standing after a violation? Does one only lose standing to complain with regard to one's victims or with regard to the entire moral community? How similar must the offenses be? But whatever the contours of the way in which standing is lost, there are certainly clear cases and I take the bar fight example to be such a case. The second transgression is temporally close and even prompted by that of the would-be complainant; it is the victim of the first transgression to whom the complaint would have to be made; and the character of the transgressions is very similar.<sup>14</sup> So it seems to me that the guy in the bar could not complain against your action. He lacks the standing to complain.<sup>15</sup>

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<sup>13</sup> Compare Kant (1965, p.86): "human beings do *one another* no wrong at all when they feud among themselves; for what holds for one holds also in turn for the other, as if by mutual consent." And Cohen (2006, p.119): "while not denying that the action was performed, and that it is to be condemned (which is not to say: while agreeing that it is to be condemned), [a person] can seek to discredit her critic's assertion of her standing as a good faith condemner of the relevant action."

<sup>14</sup> This is not to say that they are the same. The existence of identical violations is certainly too strong a requirement. The guy at the bar, for example, could not rationalize his complaint by saying, "I acknowledge a principle that retaliation is wrong—one should always turn the other cheek—and you did not. But I didn't violate that principle. And I acknowledge no principle that says one shouldn't defend the honor of one's favorite football club by violence. So I am not trying to appeal to any principle that I do not myself follow in making this complaint against your actions." This reply is not successful in part because it sounds so disingenuous. But even if the person sincerely believes there to be a principled difference between the actions, this does not mean that he has standing to complain.

<sup>15</sup> It's certainly possible that moral transgression or avowed rejection of a principle is not the only way that one can suffer a discrete loss of standing to complain. Frances Kamm asked me whether someone might be unable to complain against another due to one's debt of gratitude to

In the law, this idea is captured by various equitable doctrines, particularly the doctrine of unclean hands.<sup>16</sup> This doctrine often goes under the slogan, “those who seek equity must come with clean hands.” It holds, essentially, that a party seeking to lodge a legal complaint may be unable to make that complaint if the party has unclean hands, either legally or morally. In the quite famous example of *Riggs v. Palmer*,<sup>17</sup> a man who killed his grandfather in order to inherit from him was denied the inheritance dictated by the will. In a more recent example, the artist Shepard Fairey appealed to the doctrine in a litigation battle with the Associated Press. Fairey had used an Associated Press photograph as the basis for his stylized “Hope” poster of then-candidate Barack Obama, which quickly became a ubiquitous image. Seizing on the burgeoning commercial use of the image, the

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that other person. This does seem plausible, although we might distinguish two possible types of cases. First, when one owes someone a debt of gratitude, it may be unseemly to complain against comparatively small or isolated transgressions. If you saved my life, then it may seem inappropriate for me to complain that you borrow a small sum of money and do not repay it promptly. But my inclination is to say that in such cases, the grateful person could complain (the complaint would be apt and well-founded), but they simply ought not. They have standing to do so, but it is not a standing they should exercise. And it seems to me that we might therefore still say that the person is wronged, albeit in a way that the person should excuse or forgive. A type of second case might also be possible, though, in which the action for which gratitude is owed and the action against which the complaint would be made are bound up with each other. Suppose that I courageously rescue you from death, but I do so with some negligence that results in the loss of three of your fingers. It seems conceivable to me that this would be a case in which I have violated a duty (in this case, a duty of care) owed to you, and yet you not only ought not complain but *cannot* complain. Perhaps, in such cases, gratitude results in a loss of standing to complain. If it does, then I think that there has been no wronging in such a case. (For the view that the benefitted party might still be wronged, see Shiffrin (1999).) Although your savior violated a duty of care that was owed to you, you have not been wronged because he did you so much of a greater good. I am not sure whether there are cases of this second type (that is, whether there are cases that should be described in this way), but, if they do exist, they provide another set of examples for the argument being made in this chapter.

<sup>16</sup> Here, again, lawyers may view it as odd to see this doctrine as a matter of standing, as it is not normally categorized this way. But I think this is simply a terminological happenstance.

<sup>17</sup> 115 N.Y. 506 (1889).

Associated Press alleged that Fairey had gone beyond fair use of its photograph without having obtained a license. Among the responses in Fairey's countersuit, Fairey argued that the Associated Press itself uses image of artists' works, including his own, without obtaining licenses. Fairey cited dozens examples of the Associated Press copyrighting and profiting from photographs of artists' work, including his own.<sup>18</sup> In making this argument, Fairey was not alleging that he comported with the norms of copyright law. One might say that the argument was not addressed to absolving Fairey's conduct. Instead, it suggested that the Associated Press lacked the position to complain.

In explicating Darwall's account in the previous section, I argued that, for him, the moral norms stem from the standing of another party to complain. Morality places us under second-personal demands of others insofar as those norms are implicit in the fact that other could complain and hold us accountable. In the sorts of cases I have been describing, however, it seems that the other party could not complain—party has lost its standing to complain. But although the other party could not complain, this does not mean that there is no norm. It is still wrong to punch the guy in the bar, and Fairey did still violate copyright law. The fact that the other party could not complain leaves open the question of what morally we owe them. Incidentally, this was precisely Rawls's understanding: although the intolerant cannot legitimately complain against suppression of their views, there remains a question of whether we should ought to surpress them.

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<sup>18</sup> Answer and Affirmative Defenses of Plaintiffs and Counterclaim Defendants, *Fairey et al. v. Associated Press*, No. 09-01123 (S.D.N.Y April 14, 2009).

### 7.2.2 SMILANSKY'S PARADOX OF MORAL COMPLAINT

In a recent paper, Saul Smilansky argues that cases like these present a deep moral paradox—what he calls “the paradox of moral complaint.” Smilansky argues that the paradox arises because there are two basic but conflicting ideas about moral complaints. According to the “non-contradiction condition for complaint,” it is the case that, “morally, a person cannot complain when others treat him or her in ways similar to those in which the complainer freely treats others” (2006, p.285). But, according to the “unconditional nature of moral standards,” it is that case that some moral standards apply unconditionally, such that anyone can be held to them and anyone can complain when they are violated. Smilansky argues that both ideas seem to have a basis in a general “legislative” conception of morality. The legislative conception of morality holds that principles apply equally to everyone and that when one acts, one thereby legislates a principle about permissibility of one’s action.<sup>19</sup>

The first of the two horns of Smilansky’s paradox is the idea that wrongdoers lose standing to complain, which I have been defending. Smilansky—who at points suggests that violent criminals or terrorists may have no complaint when they are subjected to police brutality or are denied proper judicial review—seems to have a broader impression of the scope of lost standing than I would be willing to endorse. But, as I have already noted, the difficult questions about the extent to which one

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<sup>19</sup> “The moral principles one puts forth apply equally to everyone, in relevantly similar circumstances. And actions count: when one performs morally significant actions, one thereby legislates, in some sense, that according to one’s principles it is permissible for relevantly similar others to perform similar actions under similar circumstances.” (2006, p.284).



forfeits moral complaints by moral transgression should not obscure the fact that some forfeiture does seem to be a significant feature of morality. And Smilansky is right to say that this feature of morality is in tension with the thought that there are some norms that are unconditional, if that means that the other party will always have grounds to complain.

Smilansky does note one way that we might escape the conclusion that there is a deep contradiction in our thinking about moral complaint. This avenue is disconnecting moral complaint from moral constraint. If one rejects the idea that violations of moral norms always produce moral complaints in others, then one can resolve the paradox. Wrongdoers may be unable to complain if they are treated in certain ways, and yet it may still be impermissible to treat them in such ways. This is, I think, entirely correct. It coincides with what I think is our intuitive understanding of cases like that of the bar fight. The fact that the other party could not complain still leaves open a question of whether one ought to treat them that way. Insofar as this is correct, it suggests an important divide between our action-guiding moral norms and our ex post moral relationships.

But Smilansky finds disconnecting moral complaint from moral constraint to be unpalatable. It is unpalatable because it would involve the rejection of the following principle: “If it is morally impermissible to treat E in a certain way, then E has grounds for complaint if anyone treats E in that way” (2006, p.289). Because he takes rejection of this principle to be so counterintuitive, he sees it as not really a solution to the paradox at all. “Its systematic rejection, and what this would imply, seems merely to change the paradoxicality rather than to solve it” (2006, p.290).

It is certainly true that resolving the paradox by divorcing moral complaint and moral norms would involve rejecting the principle that Smilansky describes. In fact, that principle amounts to nothing more than a statement of material conditional that the cases of lost standing to complain seem to shed doubt on. So why does Smilansky take a rejection of this principle to be deeply troubling? It's not entirely clear. He asserts (with an exclamation point to emphasize absurdity) that this would mean that "it may be impermissible to treat E in a certain way, but if this is done he nevertheless cannot complain" (2006, p.289). But this again is merely a statement of the idea being asserted, and not an explanation of why it should be rejected. He also notes that rejection this principle would mean that certain people could complain about some morally wrong act while others might not. But again, this should hardly seem unfathomable. Suppose that in returning the punch in the bar, you knock your adversary into an innocent bystander who is hurt. There is nothing peculiar in the thought that the bystander, but not the adversary, could complain about your action. In fact, the whole point about the phenomenon of lost moral standing is that one party uniquely loses the ability to complain, which is to say that others might have been able to complain. So the potential asymmetry of complaint across parties is basically just part of the phenomenon.

### 7.2.3 LEGISLATING, COMPLAINING, AND MORAL NORMS

The real reason, I take it, that Smilansky is unwilling to accept a disconnect between moral complaint and moral constraint is because he views such a move to be in tension with his 'legislative' conception of morality. How this is the case

is not really developed in Smilansky's paper; it doesn't obviously follow from the brief description he offers of the 'legislative' conception. The legislative conception of morality is most naturally understood in a Kantian vein as saying something about the metaphysics of normativity. Normativity, according to this thought, requires recognition of something law-like, something that applies equally to all similar circumstances, so that, when one acts for a reason, one is ratifying a principle for others as well.

But Smilansky seems to think that the legislative conception of morality implies something about complaints and accountability as well. In this, I suspect that Smilansky is moved by something similar to what moves Darwall. The idea is that morality is "owed to" others insofar as its norms are norms to which we can hold each other accountable. Normative principles implicate complaints and accountability, and vice versa. So when we enact normative principles, we are deciding not only what one ought to do, but what complaints we can make of one another. If one accepts this connection between morality and accountability, then the legislative conception of morality takes on a stronger form. When I act, I am legislating principles about what I think we owe to each other, which is to say, what we all can demand from each other and what we can complain against. Notice that Darwall's thesis is essentially the contrapositive of this: When we complain against something, we are implicitly making a judgment about what actions are impermissible. In short, both views see a necessary connection between moral complaint and moral norms as being at the heart of moral reasoning.

My claim, however, is that such a connection does not square with the moral

phenomenon of transgressors losing their standing to complain. Just as Smilansky views such cases as presenting a deep paradox for the legislative conception of morality (as he envisions it), so too should such cases be viewed as presenting a deep problem for Darwall's second-personal account. If the fact that someone has standing to complain is the basis for our second-personal moral reasons, then there cannot be moral reasons in the absence of such standing. It seems to me, however, that there can still be moral, deontological reasons.<sup>20</sup>

One might respond by denying this last point—that is, by denying that there are any distinctly moral or second-personal reasons at play in these cases.<sup>21</sup> On this view, there may be reasons not to punch the guy in the bar or for Fairey not to take the AP's images or for society not to suppress the intolerant, but they are not the distinctively second-personal reasons of morality. The obligations of morality are, for Darwall, just those for which someone could hold us accountable.<sup>22</sup> Because the reasons in these cases are not of this sort, they are not about what we owe to others—and this is the subject of morality.

This response, however, does not seem to me to do justice to the obligations that are at play in these cases. The obligation not to punch the guy in the bar is, it seems

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<sup>20</sup> In one way, my argument is that we can still have the legislative conception of morality without the strict connection to accountability that Darwall and Smilansky assume. Our actions can be subject to laws that stem from the authority of other persons without it being the case that those other persons can make complaints against us. Put metaphorically, I can see others have legislative authority alongside me, without also thinking that they have policing or judicial authority.

<sup>21</sup> Smilansky suggests something like this in a footnote. He says that “when we forbid stealing from our thief, we do so not out of concern for his rights” but instead out of “[t]he conventional nature of property relations, and the thought that cannot permit lawlessness” (2006, p.289 n.2).

<sup>22</sup> “What I say entails that if we have such moral obligations, then these are among the things we free and rational agents have the authority to demand of one another” (Darwall, 2009, p.28).

to me, a moral obligation. The guy has a right not to have violence done to him. He may not be able to complain if the right is violated, but it is not as though the right is altogether forfeited, leaving only some other abstract norm preventing violence. He is a person, and you owe it to him not to treat him that way—whether or not he has standing to make this demand. Put another way, you have the same kind of reason not to punch him, regardless of whether he can complain.<sup>23</sup> Similarly, I think that we should say that Fairey’s legal obligation not to use AP photographs without permission is based on the AP’s legal rights, even if it lacks the standing to complain against the violation of those rights. Notice that if it were not the AP’s right that is still doing the work, then it is hard to see why getting the AP’s permission would matter. So, for all these reasons, it seems to me that one cannot escape by suggesting that they only involve other reasons and not those of morality, rights, and directed obligations.

#### 7.2.4 A BRIEF NOTE ABOUT “WRONGING”

I want to close this section by briefly noting, without argument, something that is probably less intuitive than I want to say about cases like these. I have argued that when someone who has transgressed a moral norm is the victim of a relevantly similar transgression, that person may be unable to complain. But I think we should

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<sup>23</sup> As evidence of this, notice that the reason would seem to have a deontological character in the sense that it would not permit interpersonal aggregation. If we thought that the reason not to do violence to one who has done us violence were not a moral reason owed to that person, then it would seem like one could do such violence against the person as long as there were a good enough reason to outweigh the reason against. If our reason for not violating the bodily integrity of rapists were not the distinctly moral reason that such a duty is owed to them, then it becomes harder to see why we could not subject them to medical experimentation if the potential benefits would be sufficiently large.

further say that that person has not been wronged. In the bar fight, for example, it seems to me that, not only should we say that the adversary has no complaint when you retaliate, but he is not wronged if you do so. But one might plausibly say that his lacking standing to complain does not show that you have not wronged the other guy, but only that he cannot assert the wrong.<sup>24</sup>

It seems to me, however, that the idea of a wrong is bound up with the moral standing of another to hold one accountable. Here, I suppose, I am in some solidarity with Darwall. To say that you have wronged X—and not merely that you have acted wrongly toward X, i.e., not done what you owed to X—is to say that X could hold you accountable. To describe you as having wronged X is to say that X stands in a certain moral relation to you—not merely that he did stand in a relation to you prior to your action. For this reason, it seems to me, the existence of a wrong requires the standing to complain. It describes something, a possibility, that exists after the fact. To be wronged is, I think, to be in a position to complain.

I have not provided an argument for this further claim here. The argument in this section has only suggested that there is an important divide between the realm of moral complaint and the realm of moral norms. On which side of this divide the relations of wrongs and wronging reside is a further question. But, in one sense, it is a less important question. I do not deny that we could, and sometimes do, use the the word “wronging” as a placeholder for the violation of rights. My claim is that

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<sup>24</sup> In support of this point, one might note that you might apologize for your punch—and that this suggests that there must be a wrong to apologize for. But apologies can serve a variety of purposes, not all of which are responses to actual wrongs. In particular, they can be used as a symbolic way of repairing moral relationships by acknowledging wrongdoing. To say that by apologizing one would be acknowledging wrongdoing is not to say that by apologizing one would be acknowledging that one had wronged the other party.

there is a different relation that also often goes under the heading “wronging.” It is the divide between these—between *ex ante* norms and *ex post* accountability—that is of essential interest. Because I take there to be strong reasons, which I describe elsewhere, for thinking that our commitments about wronging do not always coincide with the moral duties that are owed to someone, I subscribe to the view that a wrong involves having a complaint. But I do not take anything in this section to settle that question.

### 7.3 LACKING THE CAPACITY TO COMPLAIN: NON-HUMAN ANIMALS

I HAVE BEEN ARGUING that theories that strongly connect relational obligations to complaints—in particular, that of Darwall, but more generally those that understand being owed a duty to be a matter of being in a privileged position as the one who stands to be wronged—face certain challenging cases. The problem arises where it appears that a party could not complain, and yet it also appears that we do owe an obligation to that party. In the previous section, I focused on cases in which a party could not complain because she lacks standing to complain based on her own transgressions. But another set of cases arises where a party cannot complain because it lacks the capacity to complain. Here I will focus on a different sort of case, epitomized by nonhuman animals. I mean to argue that we can owe duties to nonhuman animals, even though nonhuman animals cannot make moral complaints or judge us to have wronged them. We owe it to animals to treat that in certain ways, but not because they can hold us accountable.

### 7.3.1 THE COMPLAINTS OF NONHUMAN ANIMALS

Throughout the Middle Ages and as late as the 16th Century, nonhuman animals were routinely brought to trial. E.P. Evans collects many such cases with fascinating and absurd details. For example, he describes an occasion in which rats were charged with “having feloniously eaten up and wantonly destroyed the barley-crop” (1906, p.18). Lawyers debated what sort of summons would properly provide notice to the rats and whether they could safely appear in court. Other oddities range from a counsellor being appointed to represent slugs that were threatened with excommunication to extensive disputes over whether accused animals should be tried as clergy or laypersons.

To us, these practices seem absurdly misguided. Evans himself described them in extremely harsh terms.<sup>25</sup> These prosecutions seem to involve treating animals as persons in a way that is wholly inappropriate. They involve treating nonhuman animals as though they are accountable to us just as like our fellow humans.

Humans, however, have the remarkable ability to give and demand justification of each other’s action. We are accountable to each other, and we hold each other to account. And we have legal institutions that are built on these relations. But we cannot relate to nonhuman animals in this way. They cannot give us justification for their actions or recognize our contention that they have acted without justification. And we should not expect them to do so. As a result, it seems absurd to haul a pack of rats into court.

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<sup>25</sup> “It was the product of a social state, in which dense ignorance was governed by brute force, and... tended to foster [club-law] by making a travesty of the administration of justice and thus turning it into ridicule” (1906, p.41).



Just as animals cannot answer the complaints that we make, animals cannot address us with complaints. They can whine, growl, whimper, struggle, and otherwise display their dissatisfaction. But they cannot complain in the special way that humans can complain. They cannot engage in a dialogue about how we ought to act or ought to have acted. In this sense, rats are no more fit to be plaintiffs than defendants.<sup>26</sup>

By saying that nonhuman animals lack the capacity to complain, I mean that they lack the capacity to complain that is essential to a view like Darwall's. On such a view, the capacity to complain does not simply mean the actual ability to articulate a protest. If I am bound and gagged such that I am prevented from any expressive action, this does not mean that I lack the capacity to complain that is relevant to Darwall. In such a case, I am capable of thinking the complaint, even if my circumstances prevent its expression. So when I say that nonhuman animals lack the capacity to complain, I do not simply mean that they lack the language abilities to address complaints. Of course, their inability to complain is related to their inability to use language, but I mean that they cannot complain in the sense that they cannot form the thought of a complaint. Even if nonhuman animals could express all their thinking to us, they generally would not express something of the form "you ought not do that to me" (where the 'ought' here is meant in a normative and not predictive sense, a point to which I will return). Perhaps this is not true of all nonhuman animals—the great apes, for example, are likely capable of such

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<sup>26</sup> For the opposite view, see Sunstein (2000, p.1359): "Animals lack standing as such, simply because no relevant statute confers a cause of action on animals." Sunstein holds this view because he does not understand the law in terms of relational morality. For him, rights are simply a matter of having legally protected interests, and standing is simply a matter of procedural legal rules.

thoughts (Wise, 2000). But the overwhelming majority of nonhuman animals lack the capacity to complain in this sense.

Of course, as I have already noted, there is another sense in which animals do seem quite capable of complaints. If I am eating a particularly smelly piece of cheese and my dog is in a feisty mood, she might whine or bark, which seems an awful lot like a complaint that she isn't getting a share. If I stop rubbing her belly, she will invariably paw at me to continue. And if I try to take her to the groomer, she might whine, or sit stubbornly and refuse to move, or even "punish" me afterwards with misbehavior. These sorts of behaviors are a testament to the way that nonhuman animals, especially domesticated ones, are capable of expressing themselves to us. And among the things that they can express is the idea, "I don't like that," or "Stop it."

But this kind of expression is not the same as addressing a second-personal reason.<sup>27</sup> It is an expression that we may take to give us a reason, but the animal does not understand the idea of giving or exchanging reasons. As Christine Korsgaard (2013) puts it, "we human beings, unlike the other animals, think of our-

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<sup>27</sup> Darwall writes, "[T]o the extent that we find the thought that we owe obligations to non-rational beings a natural thing to think, it seems likely that we also impute to them a proto- or quasi-second-personality, for example, as when we see an animal's or an infant's cry as a form of complaint" (2009, p.29). There is surely something correct about this observation, but it doesn't seem to me that it really gets Darwall out of the difficulty. Proto- or quasi-second-personality can only be the basis for proto- or quasi-duties, and I think we want more than that. But more importantly, it seems to me that Darwall's observation accidentally bespeaks the knowledge that the order of explanation goes the other direction that what Darwall would have it. We recognize the duties owed to them and then impute a complaint. But on Darwall's view, the reasons and duties are supposed to come from relating second-personally. It seems to me that Darwall is more right here than he knows—it is natural to think that we owe obligation to animals because we do, but any sense that nonhuman animals can complain or hold us accountable is mere anthropomorphic imputation.

selves and our lives in normative terms.” This difference is critical. Making a complaint or holding accountable requires the ability to understand action in normative terms—that is, as based on reasons. And this capacity is precisely what non-human animals seem to lack.<sup>28</sup>

A dog can distinguish pleasurable and painful events, but a dog cannot really distinguish between your having or not having good reason for what you do. In fact, we are well aware of this inability to distinguish justified and unjustified actions. It is what produces the distinct sort of regret we feel for causing even justified discomfort to animals. We know that our animals cannot understand that there is a good reason for spaying them, or giving them vaccination shots, or caging them for their own safety. Even relatively young children can be offered reasons (or the assurance that reasons exist) for the unpleasant things that we put them through, but nonhuman animals cannot. Their inability to appreciate reasons is part of the distinctive innocence that we find in nonhuman animals.

But it means that there is an important relation that we cannot have with non-human animals. We cannot act toward them in ways that are justifiable or unjustifiable to them; we cannot stand in relationships of justification with them.<sup>29</sup>

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<sup>28</sup> See Korsgaard (2011, p.103): “Reason looks inward, and focuses on the connections between our own mental states and attitudes and the effects that they tend to have on us. It asks whether our actions are justified by our motives or our inferences are justified by our beliefs... [T]he difference between human beings and the other animals is not that we are self-conscious and they are not. It is, as it were, both smaller and bigger than that. Human beings have a particular form or type of self-consciousness: consciousness of the grounds of our beliefs and actions. But that little difference makes a very big difference. For it means that human beings are both capable of, and subject to, normative self-government, the ability to direct our beliefs and actions in accordance with rational norms.”

<sup>29</sup> This is to be distinguished from acting toward them in ways that are justifiable or unjustifiable. It’s not that questions of justification cannot arise in regard to our conduct toward animals, but that we cannot stand in relations of justification with them.

For this reason, the relationship of wronging—that of having a valid complaint against—seems inapt for our relationships with animals. My dog is certainly the sort of thing that stands to be harmed, but she is not the sort of thing that stands to have a complaint. And, in this way, I can stand in relationship to her as one who has harmed and one who has been harmed, but I cannot stand to her as one who has wronged and one who has been wronged.<sup>30</sup> A dog lacks the capacity for the thought required for such a relationship.<sup>31</sup> In this sense, though animals suffer like we do, they do not suffer wrongs like we do.<sup>32</sup>

The animal's inability to complain here is significantly different than the moral transgressor's. As I noted earlier, when one asks whether someone could complain referring to a question of standing, the sense of 'could' is more than mere physical

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<sup>30</sup> See Gaita (2005, p.176): "Animals lack almost entirely [rationality]. That is one reason why we cannot wrong them when we are cruel to them as we would wrong a fellow human being to whom we are cruel. It is why we cannot wrong them when we kill them as we would wrong a human being if we murdered him. And that is why we speak so naturally of us and them, of human beings and animals, rather than human beings and other animals."

<sup>31</sup> Implicit in the argument here is an assumption that, in order to be wronged, something must be the sort of thing capable of understanding what it means to be wronged. I think this is correct. In fact, this highlights the relational character of wronging. For X to wrong Y requires something of both X and Y. It is, as Michael Thompson emphasizes, a two-place predicate that requires an entity of a special sort on both sides.

<sup>32</sup> Some readers may find it hard to say that one cannot wrong animals. As noted in the previous section, I don't want to get bogged down in discussing the use of the word "wronging." My central argument is that they cannot complain or hold us accountable in Darwall's sense. But I want to make a few observations to mitigate any linguistic resistance to my claims here. If one asks, "Does a person who tortures an animal wrong the animal?" one might be inclined to say yes. But this, I think, is largely because we don't want to say no. In the context of the question, the primary thing that we want to communicate is that the torture is a violation of what is owed to the animal. As I have noted elsewhere, we can use the word "wronging" as a placeholder for rights violations, and I think that is what we do here. The more relevant question is whether we naturally invoke notions of wronging when talking about animals. I think that we do not. We can naturally speak of harming, hurting, or injuring. But "I have wronged my dog" and "the dogs were wronged" are, I think, awkward and unnatural constructions. An examination of actual usage patterns confirms this.

possibility. The transgressor cannot complain, although she has the physical capacity to do so, because she lacks the authority to appeal to the relevant norm. Nonhuman animals, in contrast, just lack the capacity to complain. But this, too, is more than mere physical inability. If nonhuman animals could complain, they would be a different kind of creature altogether.

### 7.3.2 OWING OBLIGATIONS TO NONHUMAN ANIMALS

Although nonhuman animals cannot complain against our actions, I believe that we can owe obligations to such animals (and not merely have obligations regarding them). That is to say, I believe that nonhuman animals do have rights, even though they are unable to hold us accountable. If this is correct, then it presents a problem for the view that directed obligations are bound up with the capacity to hold accountable.

But why think that nonhuman animals can be owed obligations, can be the bearer of rights? After all, there is a plausible conception of what it is to be owed an obligation that says that it simply is to be a party who stands to be wronged. This is idea with which I began the chapter—standing to be wronged is a precondition for being a rightholder. This view resonates when we think of moral obligations as related to accountability or justifiability. If our directed duties are those things that we are required to do in order to ensure that our actions are justifiable to others, then we cannot have directed duties to entities to whom requirements of justification are inapplicable.<sup>33</sup> Or to put the point in Darwall's language, we could not

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<sup>33</sup> See, e.g., Scanlon (1998, p.182): "[I]f we have reason to care about the justifiability of our actions to other rational creatures, but not to nonrational ones, then our actions toward them are

owe the special moral sort of reasons to nonhuman animals if they are not capable of addressing us second-personally. Or in Scanlon's terms, nonhuman animals will not fall within "the narrower part of morality" that concerns what we owed to each other if they are not the sorts of creatures that we should interact with on terms of mutual justifiability.

This view need not be callous. Such a view can acknowledge that we have reasons and duties—perhaps very strong reasons and duties—not to treat nonhuman animals badly. Some of these reasons may be based on what we owe to other humans or to ourselves. And there may be impersonal reasons against harming animals.<sup>34</sup> That is, to say that we do not owe obligations to nonhuman animals need not threaten the idea that we have important duties with regard to nonhuman animals.

Still, I want to suggest that we should view ourselves as having obligations that are owed to nonhuman animals.<sup>35</sup> There are three general types of considerations governed by a further class of reasons."

<sup>34</sup> See Darwall (2009, p.28): "Of course, even if we do not, even if, say, harming wilderness or members of other species were not in itself to violate and demand for which we can be held morally accountable, there would still be weighty reasons against such harm." Scanlon (1998, p.181): "[I]t is not necessary to claim that nonhuman animals fall within the scope of the narrower part of morality I have been describing in order to account for the fact that there are serious moral objections to torturing animals for fun and to such practices as subjecting them to painful treatments in order to test cosmetics."

<sup>35</sup> Korsgaard (2011) argues that we can view ourselves as having obligations owed to nonhuman animals despite their inability to engage in the shared lawmaking of moral thought. Her argument, roughly, is that we can make sense of 'owed to' in the sense that something is the source of the interests that a norm is meant to protect. She then argues that we confer value on our own animal nature—pleasure and so on—and that we thereby construct norms that make it wrong to cause pain or otherwise to harm animal interests. The nonhuman animals, which also have these interests, can be owed obligations in the sense that their interests are protected by the moral norms that we construct. I have reservations about both stages of this argument, which may ultimately stem from a general agnosticism about Korsgaard's constructivism. First, as I argued in Chapter 2, I do not think that the idea that one is the intended beneficiary of a

that I think press in this direction. But, before turning to those reasons, I want to register something peculiar about the idea that animals cannot be owed duties because they cannot enter into relationships of justification and accountability. The argument purports to say something about how we ought to act toward other creatures based on how those creatures are capable of responding to or viewing those actions once they have been performed. What we owe, going forward, is taken to depend on how it would be viewed in retrospect.

But why think that what is owed depends on the capacity to view matters in a particular way, retrospectively? Suppose, albeit quite fancifully, that there was a human with the complete inability to remember anything that has happened in the past, even the immediate past. There is a real condition that is vaguely like this called anterograde amnesia (which reached popular awareness after the film *Memento*). But what I am imagining would be quite a bit more extreme than any real case. Such a person, by virtue of cognitive disability, would not be capable of making complaints or holding us accountable. But it would be odd to infer that there cannot be obligations owed to such a person. Undoubtedly, such a disability would make someone incapable of having the same sorts of relationships with us.

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norm is sufficient to generate the idea of being a rightholder, i.e., the subject of an obligation 'owed to' that person. One wants the idea that the rightholder, in some sense, possesses the norm, not merely the benefit conferred by the norm. Second, it seems to me that Korsgaard's argument makes the moral status of nonhuman animals too contingent on their similarity to us. Nonhuman animals get protection because they happen to have interests that overlap with our own. But this seems too accidental. Suppose that humans did not have animal interests—that is, suppose we were angels with only nonmaterial concerns. Would such creatures not owe obligations to animals? On the other hand, if merely having interests—similar to ours or not—is the key, then we should owe duties to plants as well as animals. Broadly speaking, my reservations arise from the sense that Korsgaard's account is too focused on humans, accounting for animals only derivatively.

There would be no difference in our relationship with that person whether we acted justly toward him or not. But it does not seem to me to follow that this person cannot be the recipient of directed obligations. What I think this suggests is that being owed an obligation has more to do with being entitled to a certain sort of treatment than it has to do with the capacity to hold us accountable.<sup>36</sup> And I think there are several features of our obligations concerning animals that give them a directed quality.

First, the moral phenomenology of our relations with nonhuman animals is that of owing obligations to them, not merely about them. When we see ourselves as having obligations regarding how to treat other animals, I believe that we see the nonhuman animals as entitled to that treatment. This is why we can speak of animal rights. Unlike beautiful art or untamed wilderness—objects that might have intrinsic value sufficient to generate reasons to treat them in various ways—we see in nonhuman animals that they are other creatures. They have a stake in how we treat them, but beyond that (for that is true of plants as well), we see them as other beings. We can look into an animal's eyes and know that it is looking back at us. In this way, nonhuman animals exert a direct moral pull on us.

A story from biologist Marc Bekoff suggests this moral pull penetrates even the most sanitized empirical settings:

A doctoral research project I was once involved in required us to kill the cats we were studying. However, when I got 'Speedo,' a very intelligent cat that I'd secretly named—secretly, because we weren't

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<sup>36</sup> Being owed a debt, for example, does not seem to depend on one's ability to call in payment. There is nothing perplexing about thinking of an unenforceable debt. I see no reason why we should not similarly consider there to be "uncomplainable rights."



supposed to name ‘subjects’—for the final exit from his cage, his fearlessness disappeared as if he knew that this was his last journey. As I picked him up, he looked at me and asked, ‘Why me?’ Tears came to my eyes. He wouldn’t break his piercing stare. Though I followed through with what I was supposed to do and killed him, it broke my heart to do so. To this day I remember his unwavering eyes—they told the whole story of the interminable pain and indignity he had endured. (2007, p.51)

What one sees in the eyes of an animal—“the fierce green fire,” as Aldo Leopold (1949, p.138) famously described it—is not inanimate or impersonal. I may recognize beauty in a work of art that I was about to destroy and suddenly view it as inappropriate to destroy it. To do so is to see a value in the world that gives me a reason for action. But to see the emotion in an animal’s eyes is more than this. It is to see another being engaged in the struggle of living.

In this way, animals are not merely the impersonal loci of value (pleasure) and disvalue (pain). As Bekoff put it, it is not merely pain but also “indignity” that the animal’s eyes make a claim against. We recognize in animals a moral status demanding respect that is not simply the acknowledgement of empirical qualities like sentience.<sup>37</sup> Raimond Gaita describes an incident in which he considered “putting down” a badly wounded cat by hitting it over the head with a shovel:

My awareness of the brutishness of what I had intended to do to Tosca had nothing to do with my estimate of whether it would have been painful for her. I assumed that if I had hit her with sufficient force I would not have caused her pain. Our attention, when we think about these matters, is too easily drawn to what the animal will feel and we

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<sup>37</sup> Compare Scanlon (1998, p.182): “But torturing an animal may seem wrong in a sense that goes beyond the idea that its pain is a bad thing: it is something for which we should feel guilty to the animal itself, just as we can feel guilt to a human being.”

think too little of what our actions mean. We think about the pain we will cause but not the dishonor we will inflict. To see the difference one need only reflect on how desperate the circumstances would have to be before one would consider killing a human being by crashing a shovel onto her head, and how terrible it would be to do it no matter what the circumstances and no matter whether one thought (rightly or wrongly) that they justified it... Was I wrong to intend to kill Tosca that way? I think I was... One day—and it may not be too far away—we may... become deeply ashamed of how impoverished our sense was of animal dignity. We may become incredulous that we could ever have left animal corpses on the road to be run over again and again. (2005, pp.35-37)

What Gaita attends to is that our obligations to nonhuman animals are, at least in part, obligations to treat them with respect. It is hard to recognize this truth and yet not see the obligations as owed to the animals.<sup>38</sup>

A second reason for thinking that we have obligations that are owed to nonhuman animals is given by the deontic character of those obligations. Our duties with regard to nonhuman animals, like our duties to each other, seem to be subject to distinctively moral constraints against aggregation and trading off. These constraints represent the understanding that moral obligations are owed to a particular other and are not simply a matter of maximizing value.

One of the hallmarks of rights-based obligations is that they are not a matter

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<sup>38</sup>It is, of course, significant here that we are capable of “interacting” with animals. Part of the reason that we seem to owe respect to animals is because of the way that our actions can interplay with theirs. It seems wrong, for example, to create expectations in an animal and then disappoint them — and this need not be because we think that there is a ‘pain’ involved is disappointed expectations. And this also suggests why the clearest examples involve domesticated animals, with whom we have developed relationships that demand respect. But it seems to me that it is more the capacity to interact, rather than the existence of a substantive relationship, that is morally significant. I need not see myself as having a relationship with the raccoon in the road, nor even think that it would cause pain, to recognize a reason to brake for it.

of maximizing some value, but they depend on a consideration of to whom the good (and bad) that are created is attached. That I cannot take your organs and distribute them in order to prevent the death of five other people reflects the fact that I owe something to you and not merely to the world generally.

It seems to me that our relations with animals have a similar character. It would be wrong, I think, to kill one dog in order to distribute its organs to five other dogs. Most would agree that the wrongness of dogfighting does not depend on the amount of human entertainment that it provides. But suppose, not implausibly, that one could run a dogfighting operation, the profits from which would be sufficient for one to save many more dogs from abandonment, disease, starvation, or euthanasia in shelters. A small number of dogs would face suffering and death in the dogfighting ring, but far more dogs would be saved. I believe that such actions would still be impermissible.<sup>39</sup>

These intuitions strongly suggest, I think, that we have obligations that are owed to the particular dogs that would suffer—by being made the innocent canine organ donor or the innocent charity pit dog. The actions are forbidden not by general reasons, but by the entitlements of individual nonhuman animals to be treated in particular ways. Here again, we see the idea that nonhuman animals are not simply

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<sup>39</sup> Apparently, not everyone shares this intuition. Ralph Wedgwood wrote in a blog post: “surely you *could* permissibly kill one bear if that is the only way for you to save five other bears from being killed by someone else.” “Scheffler’s paradox: Persons vs. animals,” PEA Soup, Jan. 25, 2010. I think more needs to be filled in before we can fully judge the case, but my intuition is that there is not any serious asymmetry between bears and people. I think one can switch the trolley with people on the tracks, and I think one can if there are bears on the tracks. I think one cannot slaughter people as a source of ready organs, and I am inclined to think the same about bears. The interesting question isn’t whether there might be a case in which saving the greater number were permissible, but whether there is a case in which it is not.

the loci for general value and disvalue, but are discrete morally significant individuals.

Finally, we view it as permissible to enforce coercively the duties that are owed to nonhuman animals. When we enforce these duties, we view ourselves as acting on behalf of the animals in a sense that goes beyond merely acting for their benefit.

In general, it is not our place to intervene against others just because they act wrongly. Someone may squander their talents or resources such that they are clearly acting in ways in which they ought not, and yet it will not warrant coercive intervention. For example, if an artist chooses to destroy his work even though its artistic value means that he has an obligation to share it with the world, it is still not permissible for us to coerce him. Coercion requires something more than merely acting wrongly.<sup>40</sup>

Our obligations to animals, however, seem to include this additional something. If the artist were torturing his cat, then it would be permissible for us to intervene and remove the cat from his possession. In fact, although our legal regime is otherwise quite stingy in its recognition of nonhuman animals, anti-cruelty statutes have long afforded nonhuman animals a set of rights, albeit quite narrow and substantially under-enforced. Anti-cruelty statutes involve state coercion, but I think that the same point can be made about even private coercion. Most of us would consider it morally permissible for someone to intervene with physical force, if necessary, to stop the brutal beating of a horse or dog. But this is not because physical intervention is permissible whenever obligations are being violated. In-

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<sup>40</sup> Kant, for example, thought that the realm of rights is demarcated in part by the fact that it involves those matters over which coercion is permissible (1784, 27:1334).

stead, I think our intuitions suggest that the case is morally akin to situations in which a person acts in defense of other people.<sup>41</sup>

Intervention in such a case is permissible not because there is an obligation that is being flouted, but because there is a right being violated. We can intervene because there is a being that is entitled not to be treated in a certain way, and this entitlement authorizes us to act on its behalf. The intervention is warranted as acting on behalf of the entitled party in order to vindicate its rights, and not merely to ensure another's compliance with his or her own obligations. If this is correct, then it suggests that we consider there to be not merely obligations with regard to nonhuman animals but obligations that are owed to nonhuman animals as a matter of right.

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<sup>41</sup> There are interesting legal cases in which people have attempted to invoke the defense of others or the necessity defense in criminal trials concerning private attempts to prevent harms to animals. From what I have seen, this move has been generally unsuccessful, although I suspect that speaks in part to the type of cases that are prosecuted. For example, in *Hawaii v. LeVasseur*, 613 P.2d 1328 (Haw. Ct. App. 1980), an undergraduate student freed two dolphins from laboratory research. The court held that the dolphins did not qualify as "others" within the scope of the state's choice-of-evils statute. In *State v. Troen*, 786 P.2d 751 (Or. Ct. App. 1990), a court rejected the defense of a fifty-seven-year-old former elementary school teacher who had participated in breaking into a University of Oregon laboratory and removing 125 research animals. The court held that because the laboratory's research was sanctioned by existing law, it could not be the basis for a necessity defense. But these cases involve attempts from animal liberation groups to circumvent the existing legal regime concerning animal treatment. The defense would have a better chance of gaining a foothold where a private citizen acts in order to prevent legally cognizable neglect or cruelty. Courts' reactions to such cases have been mixed. In *McCall v. State*, 540 S.W.2d 717, 720-21 (Tex. Crim. App. 1976), a Texas court explained, "Appellant kept the dogs in an open field clearly in view of neighbors and passersby. If it was apparent that the animals were not being properly cared for in possible violation of the law, it was not unreasonable to go onto the property and seize them and the introduction into evidence of photographs of the animals was not error." In *Carr v. Mobile Video Tapes, Inc.*, 893 S.W.2d 613 (Tex. App. 1994), a court held that the Humane Society could argue necessity as a defense against trespass, where it entered a property to seek evidence of animal cruelty. In *Commonwealth v. Grimes*, 982 A.2d 559 (Pa. Super. Ct. 2009), however, a court held that the use of "another" in the state's choice-of-evils statute referred only to "persons," thereby denying the defense from a woman who had illegally taken a neglected dog after notifying the Humane Society and seeing no progress.

### 7.3.3 HYPOTHETICAL OR TRUSTEE COMPLAINTS

I have been arguing that nonhuman animals constitute an example in which we owe duties to another party even though that party could not complain if the obligation is violated. If this is correct, then it presents a difficulty for the view that the duties we owe to others are based on their standing to complain or demand justification for our actions.

But the last point that I made—that we can see ourselves as acting on behalf of the rights of nonhuman animals—suggests a possible response. Although nonhuman animals cannot complain or demand justification, perhaps the sense that we owe them directed duties can be captured by the fact that we could complain or demand justification on their behalf. Scanlon suggests, without full endorsement, this possible response for contractualists: “A contractualist view can accommodate this intuition [that obligations are owed to animals] if it holds that in deciding which principles could not reasonably be rejected we must take into account objections that could be raised by trustees representing creatures in this group who themselves lack the capacity to assess reasons” (1998, p.183). Stephen Darwall makes a similarly non-committal suggestion of this approach:

[A]lthough I am bound to insist that moral obligation, like the concept of a right, cannot be understood independently of authoritative demands, the thought that moral obligations can be owed to beings who lack second-personal competence might be able to be elaborated in terms of trustees’ (for example, the moral community’s) authority to demand certain treatment on their behalf (perhaps also to claim certain rights, compensation, and so on, for them). Thus, Dr. Seuss’s character the Lorax (a free and rational being) declares, ‘I speak for

the trees.' (2009, p.29)

The idea of having trustees to exercise the legal rights of animals is also suggested as a way forward for the awkward legal status that nonhuman animals are currently given (Favre, 2000, p.476).

There is something appealing in this idea. I think that why it is appealing is something like the following: what is important is the moral standing to complain; nonhuman animals do seem to have a significant moral standing; they merely lack the ability to exercise this standing; so we can allow others to exercise their complaints for them in light of their own inability. That is, the temptation to appeal to trustees is a temptation to focus on standing in the moral community, rather than on any actual set of capacities. This allows one to say that nonhuman animals do have standing to complain when they are harmed in certain ways; they simply lack the capacity to exercise this standing.

I think, however, that the allure of this idea diminishes when one thinks more carefully about it. What does it mean to say that animals have the standing to complain or demand justification, but they merely lack the capacity? It cannot mean that the moral status of animals is based on the fact that they could make complaints against us if they were capable of making complaints. In one sense, that is a tautology. If maple trees were capable of addressing us second-personally, then they could complain against being chopped down. If marble were capable of making complaints against us, then it could complain against being quarried.

But there is another sense in which this is not a tautology. This involves understanding the 'could' in two different ways—one as a matter of moral standing and

the other as a matter of capacity. It is wrong to torture a cat, and if the cat could issue a complaint against such treatment, it would be a valid one. It is not, however, wrong to quarry marble. Holding that fact fixed, even if the marble were capable of complaining, it would not have a valid complaint. The cat has moral standing that the marble does not, in the sense that there really is a norm according to which it ought to be treated. This is what is meant by saying that the cat would be able to complain, if it were capable of addressing us with moral complaints.

This explanation, I think, gets at the idea behind the view, but it also suggests its weaknesses. In one way, the idea can seem relatively empty. If what is meant by saying that cats could complain is merely that there are norms concerning cats, then this view doesn't capture the intuition that the obligation is owed to the cat. Instead, what must be meant is that there are duties owed to cats. But this loses the idea that the directedness is based on the standing to complain. The directness of obligations owed to cats cannot be based on their moral standing if their moral standing simply amounts to the fact that there are obligations owed to cats. If this is all that the trustee view involves, then it is merely an ad hoc way to preserve the coextensionality of moral norms and potential complaints. And it does so at the expense of the view that the moral standing provides grounding for the moral norms. Elsewhere, I have noted that we are sometimes tempted into using the concept of a right in a merely placeholder way, denoting nothing but that someone stands to be wronged. Here is opposite. For similar theory-driven reasons, one is tempted to use the idea of complaint or wronging in a merely placeholder way, denoting nothing but that there is an obligation owed to the party.



On the first of these two points (the concern about emptiness), I think there is a difference between what Scanlon and Darwall say. To his credit, Scanlon accepts that an appeal to trustees' complaints must add something. For this reason, Scanlon explicitly rejects the idea that we could incorporate objects like trees, which have a good but which lack consciousness or action. As he puts it, "Nothing would be added by bringing in the idea of what a trustee for these objects would have reason to reject" (1998, p.183). As Darwall's own example suggests, in contrast, he seems to think that our obligations with regard to trees might be rendered second-personal if there were someone who could, like the Lorax, "speak for the trees." It seems to me that Scanlon is correct here. For the appeal to trustees to have any force, it must suggest something beyond the general reasons we have for treating nonhuman animals in certain ways. That it is unlikely to do so seems to be part of the reason that Scanlon is ultimately inclined away from the view.

But, with regard to the second of the two problems (the concern that the appeal to trustees is ad hoc rather than explanatory), I think Scanlon and Darwall are in similar predicaments. The problem arises because the initial theories hold that the obligations we owe to each other can be explained by virtue of some form of standing, either to complain or be treated in ways that are justifiable to us. One cannot then resolve the apparent phenomenon of owing obligations to creatures that can neither level complaints nor give and receive justification by simply positing others who might make complaints or demand justification on their behalf. To do so seems ad hoc. The theories originally purported to go from the moral standing to complain or demand justification to the norms of morality. But it now

appears that they are positing someone with the standing to complain or demand justification in order to accommodate the moral norms that we view there to be. At that point, why not simply concede that there can be obligations that are owed to individual nonhuman animals and yet are without any particular complaint or demand for justifiability undergirding them?

#### 7.4 CRIMINALS AND ANIMALS

AT THE BEGINNING OF THIS CHAPTER, I quoted Jeffrie Murphy, arguing that the psychopath cannot be wronged. Murphy goes on to argue that the psychopath is “more profitably pictured—from the moral point of view—as an animal” (1979, p.136). As he puts it, “the psychopath, by his failure to care about his own moral responsibilities, his failure to accept them even if he recognizes them, becomes morally dead—an animal rather than a person” (1979, p.136). This is a philosophical endorsement of a cliché piece of rhetoric. It is frequently said of those who transgress against morality that they are “animals.”

This comparison will strike some as unfair in both directions. To one concerned with criminal rights, the suggestion that criminals should not be treated as fellow humans is offensive. But one might equally say that the comparison is offensive to animals, which, despite their innocence, are analogized to morally debased persons and which are thereby implicitly presupposed to lack any moral standing at all. The use of “animal” to mean subhuman seems terribly offensive to animals.

If what I have argued is correct, then we can see the truth in the comparison without endorsing the extreme callousness of it in either direction. Moral trans-

gressors and nonhuman animals are both, in different ways, without the ability to call us to account for our actions—to expect or demand that we stand in relations of mutual justifiability with them. Transgressors lack the moral authority to complain; animals, by their very nature, are incapable of complaining. These are very different kinds of disabilities. But they are analogous insofar as they are both beyond mere physical inability. They are unlike the fellow with the gouty toe who cannot get the words out. There is no possibility of a complaint. And, in this sense, both criminals and animals do not suffer wrongs when they suffer mistreatment.

But it need not follow from this, I have argued, that we cannot owe obligations to either transgressors or animals. Indeed, I have argued that there are obligations that we owed to such beings, and not merely obligations that we have with regard to them. So, the psychopath and the nonhuman animal are similar, but not, as Murphy would have it, because both are utterly without rights. I believe that they both have rights. What they lack is to possibility of complaint.

This interpretation of these cases presents a challenge to the view that directed obligations are distinctively bound up with the standing to complain or demand justification. For a theory like Darwall's, it should be impossible for there to be moral obligations owed to another—obligations of a second-personal character—without a corresponding possibility of complaint. But if what I have argued is correct, then this is not only not impossible, but it is a relatively common moral phenomenon. These cases of absent standing or capacity to complain are, I believe, a strong reason for distinguished between rights and relational obligations, on one hand, and complaint and wronging, on the other.

*You said in the Park yesterday that possibly you had made a mistake in taking up medicine: you immediately added that probably it was wrong to think such a thing at all. I am sure it is... The thing now is to live in the world in which you are, not to think or dream about the world you would like to be in. Look at people's sufferings, physical and mental, you have them close at hand, and this ought to be a good remedy...*

Wittgenstein

# 8

## An Argument from Bad Thoughts

WHILE WITTGENSTEIN'S COMMENT in a personal correspondence quoted above (Malcolm, 1995, p.125) is easily read as just an ordinary piece of prudential advice, what I find appealing in it is the sense that the advice is not just prudential, but also moral. Less poetically than Wittgenstein, there is a bumper sticker that says, "Think Good Thoughts." This chapter defends that view. More precisely, this

chapter defends the claim that there are moral obligations, owed to others, to think certain thoughts and not others, irrespective of any effect on external conduct. My sense is that some will find this claim bumper-sticker obvious and some will find this claim deeply troubling. This reflects, I think, a tension between our everyday moral sensibilities and theoretical commitments about morality and rights. This chapter aims to alleviate this tension by appealing to a distinction between what we owe to other people and what they can claim from us. My hope, by the end, is to make the idea of impermissible thoughts appear less theoretically problematic, while also suggesting that the way to accommodate this idea is by distinguishing what we owe to someone such that they might be wronged and what someone can claim as a matter of right.

Before proceeding, however, there is one technical, cautionary note about what is *not* my topic. I am going to try to steer mostly clear of the complicated questions that arise around the ethics of belief. I will not generally be considering whether it is morally wrong to form a particular belief—a topic that raises difficult questions about doxastic voluntarism and the relationship between epistemic and moral norms. My topic is primarily non-doxastic mental activity—wondering, fantasizing, coveting, imagining, hoping, daydreaming, loathing, and so on. Mental activities like these are more clearly under our control, and therefore raise fewer questions about choice.

Nevertheless, these things exist on a spectrum representing different degrees of control. At the minimum, I hope to convince you that those mental activities that are most clearly voluntary are the subject of morality. But, at points, my arguments

will suggest that morality reaches further along the spectrum, and I do endorse this stronger claim as well, even if it is not my primary subject here.

## 8.1 THE TENSION

I WILL BEGIN BY ATTEMPTING to describe what I take to be a tension between our everyday moral concepts and some common philosophical commitments. On the one hand, it is common to find ourselves morally obligated to avoid certain thoughts or fantasies—that is, certain mental activity. On the other hand, there is general philosophical pressure towards the view that morality pertains only to what we do to one another. I think that there is enough of a tension between these ideas and tendencies that an explanation is wanted. To illustrate this point, I’m going to start with examples of both sides of the tension; there are a lot of examples, but I think they are valuable to get the thrust and scope of the problem.

### 8.1.1 THE COMMONSENSE MORALITY OF THOUGHT

#### JUDEO-CHRISTIAN ETHICS

In the Judeo-Christian tradition, the idea that morality governs thoughts as well as action is familiar. To take one obvious example, the Ten Commandments demand, “Thou shalt not covet thy neighbor’s wife,” and, “Thou shalt not covet thy neighbor’s house.” Read naturally, these are prohibitions on thoughts and attitudes, not on action. Maimonides, our first philosopher troubled by a prohibition on pure thought, attempted to distinguish the Exodus commandments, which say

“covet,” from the Deuteronomy commandments, which say “desire.” Coveting, he maintained, implied some actual deed or scheme to acquire the object; desiring, he argued, was prohibited only because “one’s love for the object will become stronger until one devises some scheme to obtain it” (1987, p.251). Maimonides, however, is the exception that proves the rule. Judeo-Christian scholars have almost universally taken the Bible to prohibit thoughts as well as actions.

Sharing Maimonides’s philosophical orientation, Aquinas believed that “sin is nothing else than a bad human act.” He reconciled this view with the Christian tradition by positing both “interior” and “exterior” acts. This view allowed Aquinas to hold both that sin requires an act and also that sin can be internal. As he puts it, sin, “insofar as it is voluntary, must needs always include some act, at least the interior act of the will” (1920, Q.71, Art.5). Thus, while Aquinas understands morality to govern only what is voluntary, he includes within its aegis the interior realm of thought and intention. Men “are to direct their thoughts and actions to the end [of God]” (1920, Q.1, Art.1).

The Christian image of internal sin is certainly alive in modern culture. In a famous *Playboy* interview, then-Presidential candidate Jimmy Carter said the following:

I try not to commit a deliberate sin. I recognize that I’m going to do it anyhow, because I’m human and I’m tempted. And Christ set some almost impossible standards for us. Christ said, “I tell you that anyone who looks on a woman with lust has in his heart already committed adultery.” I’ve looked on a lot of women with lust. I’ve committed adultery in my heart many times.

While the statement generated a lot of satire, it may have helped Carter because

Americans were sympathetic with his honesty and with the sentiment that he expressed (Gardner, 1994, p.181).

#### PERVERSE FANTASIES: RACISM, SEX AND VIOLENCE

I suspect that even many who consider President Carter's remark bizarrely puritanical and who think of him- or herself as morally permissive will balk at the moral permissibility of certain thoughts. The list of taboo thoughts is easy to conjure if uncomfortable to describe. For one, I think most people would find it immoral to consciously harbor racist thoughts. As one author puts it, "White racist contempt... is in its very constitution disturbing and immoral" (Kim, 1999, p.123).

Entertaining or harboring some sexual and/or violent fantasies is also likely to seem immoral. Even if it does not alter one's external behavior, it is hard to imagine that one is morally permitted to do what one may with another person so long as it is in one's mind. In his final interview before being executed, Ted Bundy described how he harbored fantasies of sexual violence before ever acting upon them: "I knew it was wrong to think about it... I was on the edge, and the last vestiges of restraint were being tested constantly, and assailed through the kind of fantasy life that was fueled, largely, by pornography."<sup>1</sup> It is, of course, possible to maintain that Bundy did nothing wrong until he acted upon these fantasies, but for Bundy (and I think any reflective agent) the conscious harboring and engaging with such fantasies *already* crossed over into immorality.

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<sup>1</sup>James Dobson, *Fatal Addiction: Ted Bundy's Final Interview*, Jan. 24, 1989.



## ATTENTION AND ACCURACY

These examples may seem so extreme as to be of little philosophical interest, but I don't believe that they are altogether different in kind from more pedestrian internal moral activity. Iris Murdoch offers an example of more subtle but morally significant mental activity:

A mother, whom I shall call M, feels hostility to her daughter-in-law, whom I shall call D. M finds D quite a good-hearted girl, but while not exactly common yet certainly unpolished and lacking in dignity and refinement. D is inclined to be pert and familiar, insufficiently ceremonious, brusque, sometimes positively rude, always tiresomely juvenile. M does not like D's accent or the way D dresses. M feels that her son has married beneath him. Let us assume for purposes of the example that the mother, who is a very 'correct' person, behaves beautifully to the girl throughout, not allowing her real opinion to appear in any way. We might underline this aspect of the example by supposing that the young couple have emigrated or that D is now dead: the point being to ensure that whatever is in question as happening happens entirely in M's mind...

[T]ime passes, and it could be that M settles down with a hardened sense of grievance and a fixed picture of D, imprisoned... by the cliché: my poor son has married a silly vulgar girl. However, the M of the example is an intelligent and well-intentioned person, capable of self-criticism, capable of giving careful and just attention to an object which confronts her. M tells herself: 'I am old-fashioned and conventional. I may be prejudiced and narrow-minded. I may be snobbish. I am certainly jealous. Let me look again.' Here I assume that M observes D or at least reflects deliberately about D, until gradually her vision of D alters. If we take D to be now absent or dead this can make it clear that the change is not in D's behaviour but in M's mind. D is discovered to be not vulgar but refreshingly simple, not undignified but spontaneous, not noisy but gay, not tiresomely juvenile but delightfully youthful, and so on. And as I say, *ex hypothesi*, M's outward behaviour, beautiful from the start, in no way alters.

(1970, pp.17-18)

Murdoch uses the example to show the possibility of mental activity. She is battling against the idea—coming from existentialism and behaviorism—that our internal life is in some sense not real. The argument attempts to rebut the emptiness of our internal life precisely by drawing attention to how it can be morally significant.

Murdoch draws out the moral significance of attention. M's change is based on a shift in what she attends to. The argument turns on the idea that we have a duty to give, what Murdoch describes as, "just and loving attention."

Putting the point generally, we have an obligation to view others charitably and not to form unwarranted negative opinions. While considering it outside the realm of rights, Judith Thomson notes the way that we use moral language to refer to such relations: "But what if I think you killed Cock Robin, when as things turn out you did not? I think we might in the ordinary way say I wronged you and did you a wrong, though it can hardly be thought that my merely harboring that thought was my violating a claim of yours" (1990, p.122).<sup>2</sup> In short, regarding others in undeserved ways seems like not merely a mistake, but a wrong to them.

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<sup>2</sup> David Owens (2012, pp.62-63) makes a similar point: "Undeserved attitudes can also wrong. Suppose I come to believe, without any great evidence, that my brother drove my father to an early grave. When my brother learns of this belief, he will feel traduced. Perhaps I never express the belief to anyone and he discovers it quite inadvertently by reading my diary. Outrage, indignation, etc. are in order here quite apart from fear of further harm or damage: my brother may feel this way even if we are already estranged. Nor does he think that his being wronged depends on his having found out what I think of him (i.e. on the distress that discovery causes). Rather he simply values being regarded as a decent person and the fact that my belief is both ungrounded and against his interest ensures that it wrongs him."

## JEALOUSY & TRUST

Thomson's example gains particular force when we imagine behind it some background relationship, like friendship. If you and I are friends, then I may especially owe it to you not to think that you killed Cock Robin. That is, friends may owe a particular level of trust to each other.

Generally, it is not uncommon to think that we owe an obligation towards a loved one not to be untrusting or jealous. This, of course, is a major theme of *Othello*. At first, Othello acknowledges the impropriety of unfounded jealousy. When Iago attempts to plant suspicion in Othello's mind, Othello initially asserts the impropriety of feeling jealousy towards his wife.<sup>3</sup> Part of the play's deep tragedy is the way that Othello is aware of the wrongness of jealousy at the same time that he falls victim to it. I think it would be odd to say that Othello's wrong consists solely in the way that he acts upon his suspicions. Rather, the conscious harboring and active cultivating of suspicions itself constitutes a large part of his misdeed. Othello's wrong occurs not merely when he kills Desdemona, but earlier, as he declares: "Arise, black vengeance, from thy hollow cell! / Yield up, O love, thy crown and hearted throne / To tyrannous hate!"<sup>4</sup> Now, I don't suppose that people actually say things quite like this to themselves, but the internal struggle is realistic. People do nurture thoughts that they ought not—and even thoughts that they know that

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<sup>3</sup> Act III, Scene 3: "Think'st thou I'd make a lie of jealousy, / To follow still the changes of the moon / With fresh suspicions? No... / ...exchange me for a goat, / When I shall turn the business of my soul / To such exsufflicate and blown surmises, / Matching thy inference."

<sup>4</sup> Act III, Scene 3. And yet again a moment later: "My bloody thoughts, with violent pace, / Shall ne'er look back, ne'er ebb to humble love, / Till that a capable and wide revenge / Swallow them up." Act III, Scene 3.

they ought not.

### 8.1.2 PHILOSOPHERS' FOCUS ON WHAT WE DO TO OTHERS

#### SOME GENERAL INFLUENCES

Generally, philosophers describe morality as principles governing how we act toward one another. In consequence, morality is taken to govern behavior—what we do *to* others.

There are, I think, a wide variety of theoretical influences that drive this assumption about morality, but I want to draw attention to a few that I find especially noteworthy. To get the flavor of the general assumption, consider a passage from Jeremy Bentham describing the foundation of morality:

The fundamental idea, the idea which serves to explain all the others, is that of an *offence*. It possesses clearness by itself; it presents an image; it addresses itself to the senses, it is intelligible to the most limited mind. An offence is an act from which evil results. To do a positive act is to put one's self in motion; to do a negative act, is to remain still. (Bentham, 1838, p.160)

For Bentham, an offense must be something done to another. Bentham illustrates several important themes behind the philosophical assumption. First, for Bentham, morality has to do with consequences—with how our actions affect others. One need not be a utilitarian, like Bentham, to share the idea that consequences are important, and that something that affects no one else is not a matter of morality. Sticks and stones can break my bones, but thoughts aren't like that at all.

Second, Bentham focuses on what one does to another because it “presents an image” and “addresses itself to the senses.” That is, Bentham focuses on the external act toward another because it is observable and, in this sense, objective. Bentham views a morality concerned with what we do to each other because that alone is what we witness and what affects us. Morality applies because our actions *produce* something that can be witnessed by the world. In this vein, Simon Blackburn remarks, “we can usefully compare the ethical agent to a device whose function is to take certain inputs and deliver certain outputs” (1998, pp.4-5).

Third, Bentham is highly reliant on an analogy between morality and the law.<sup>5</sup> The legal analogy—the idea that morality is a set of rules created by a legislator—gently suggests that morality governs conduct, not thought, because the laws of the state govern conduct, not thought. At least, this is an important feature of the liberal state; thought crimes exist only in Orwellian dystopias.

It may be useful here to draw attention to the idea of rights because it is an important part of the analogy to the law. The law imposes boundaries on how we may treat one another, marking out for each person a unique sphere of control. Rights, like Bentham’s idea of an offense, seems to be about outward conduct. Although we may frown upon certain thoughts, we intuitively resist the idea that there is a right concerning other people’s thoughts. Racist thoughts may be abhorrent, but we may think that they still don’t violate anyone’s rights. The analogy

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<sup>5</sup> Compare Scanlon (1998, p.153): “[Contractualism] holds that an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced general agreement... According to contractualism, thinking about right and wrong is in one respect like thinking about the civil and criminal law...”

between the laws of morality and the laws of the state introduces this way of thinking, and consequently suggests that morality does not concern our thoughts.

Finally, consider the following passage from Kant, in which the analogy between morality and the law is at work but not the primary point:

For a human being cannot see into the depths of his own heart so as to be quite certain, in even a *single* action, of the purity of his moral intention and the sincerity of his disposition, even when he has no doubt about the legality of the action... In the case of any deed it remains hidden from the agent himself how much pure moral content there has been in his disposition. (1965, 6:393)

Kant's point seems to be that what happens within the agent is obscure even to the agent him- or herself. We cannot assess our own dispositions and capacities accurately. They are, in an important way, inscrutable to us.

On a related note, Kant suggests that certain attitudes toward others are not the sort of thing that we can owe to one another because they are not part of the deliberating agent's choice. Here, Kant distinguishes "pathological love" from "practical love." The former, he thinks, cannot be a duty. He writes, "[T]here can be no direct duty to love, but instead to do that by which one makes oneself and others one's end" (1965, 6:410). This is not because love for another is not moral in character.<sup>6</sup> Instead, pathological love is not a duty because it is not exactly a matter of choice. As will be discussed further below, contemporary thinkers like T.M. Scanlon have similarly picked up on the argument that our motives and reasons are not a matter of choice.

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<sup>6</sup> Kant views pathological love as a precondition of being a moral agent at all (1965, 6:399).

These different commitments—the importance of consequences, the need for something objective, the analogy to law, and the inscrutability or uncontrollability of our feelings—are diverse. But, in a loose sense, they are united around the idea that thoughts are not part of morality because they are not the kind of thing that others could make a claim on. Morality doesn't apply to thought because thought alone doesn't *do anything to anyone*. Why should we be entitled to make demands about it?

#### AN ARGUMENT AGAINST THE DOCTRINE OF DOUBLE EFFECT

These diverse commitments crystallize in one argument that I find particularly convincing. This is an argument, first raised by Judith Thomson, against the so-called doctrine of double effect. The doctrine of double effect holds roughly that one may cause a bad outcome in order to bring about a sufficiently better outcome if and only if one does not intend the bad outcome as a means to the good outcome. For example, if a trolley is headed toward five people but it could be redirected onto another track to kill only one person, the doctrine of double effect says that it is okay to redirect the trolley as long as one doesn't intend to kill the one—as long as that is just an unintended side effect.

Thomson's argument aims to refute this doctrine by showing that an agent's intention is not relevant to determining the permissibility of an action. As such, it is not explicitly a rejection of the morality of thoughts, but the challenge should be clear: if the argument is right, then permissibility is a matter of external conduct, not internal thoughts and attitudes—in particular, not intentions. To make

the argument, Thomson imagines a husband, Alfred, who wants to kill off his sick wife.<sup>7</sup> He buys a substance thinking it poison, but, unbeknownst to him, it is the only cure for his wife's disease. Thomson then argues that it must be permissible for Alfred to give her the stuff—after all, it is what she needs. So it can't be that permissibility depends on one's intention.<sup>8</sup> This argument has appeal, but there is room for some doubt. After all, Alfred seems to be committing attempted murder, and attempted murder is surely impermissible.<sup>9</sup> It seems problematic, at least, that Alfred didn't know that what he was doing was okay.

But if this is a worry, Frances Kamm offers essentially the same argument as Thomson, but she slips into it the fact that the agent's behavior is responsive to the permissibility of his action:

Consider again the Trolley Case. Suppose that it is a bad person who sees the trolley headed toward the five. He has no interest in saving the five *per se*, but he knows that it is his enemy who will be the one person killed if he redirects the trolley. He does not want to be accused of acting impermissibly, however, and so while he redirects

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<sup>7</sup> "Here is Alfred, whose wife is dying, and whose death he wishes to hasten. He buys a certain stuff, thinking it a poison and intending to give it to his wife to hasten her death. Unbeknownst to him, that stuff is the only existing cure for what ails his wife. Is it permissible for Alfred to give it to her? Surely yes. We cannot plausibly think that the fact that if he gives it to her he will give it to her to kill her means that he may not give it to her. (How could *his* having a bad intention make it impermissible for him to do what *she* needs for life?)" (Thomson, 1991, pp.293-94).

<sup>8</sup> "It is irrelevant to the question of whether X may do alpha what intention X would do alpha with if he or she did it" (Thomson, 1991, p.194).

<sup>9</sup> It is actually an interesting question to what impossibility is a legal defense to a criminal charge for an attempted crime. At times, courts have distinguished factual impossibility, as when someone pulls the trigger of an unloaded gun, from legal impossibility, as when someone tries to steal an object that has been legally granted to them. There is also some thought that extreme cases of factual implausibility—for example, attempting to murder by voodoo—might not be criminal. But, in general, courts are unreceptive to the impossibility defense. And the impossibility in Alfred's case is straightforward factual impossibility, which courts are not likely to excuse.



the trolley in order to kill the one, he does so only *because* he believes that (i.e., on condition that) a greater good will balance out the death. Hence, he would not turn the trolley unless he expected the five to be saved (Bad Man Case). His redirecting the trolley is still permissible, I believe, though he does it in order to kill his enemy. (2006, p.132)

Like Thomson, Kamm takes the argument to show that permissibility is generally independent of intention. As a result, the objection has force against all “state-of-mind principles.” That is, the question of permissibility is pushed outward.<sup>10</sup> T.M. Scanlon has also recently argued that permissibility is a matter of an action’s relation to the world and not a matter of the agent’s intention: “what makes an action wrong is the consideration or considerations that count decisively against it, not the agent’s failure to give these considerations the proper weight” (2008, p.23).

I find these arguments very plausible. If, however, the bad man acts permissibly despite his bad intentions, how can we say that our inner activity is also the subject of morality? If Kamm’s bad man acts permissibly, how can Murdoch’s M be said to act impermissibly?

## 8.2 SOME UNSUCCESSFUL EXPLANATIONS

NOW I WANT TO CONSIDER four possible explanations for the tension. Each explanation has truth in it. My claim, however, is that none can offer a full account of the tension.

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<sup>10</sup>“When it is impermissible for an agent who intends [evil] (as a means or end) to do an act, it will be because of some characteristics of the act or its effects (or their relation) independent of his intention.” (2006, p.135)

### 8.2.1 EFFECTS ON EXTERNAL ACTION

The first response to some of the examples I offered above is likely to be that the thoughts are wrong not in themselves, but rather because of the consequences these thoughts have for external conduct. “C’mon, Ted Bundy and Othello,” one might say. This is a straightforward consequentialist explanation—the thoughts are wrong because they have bad consequences.

It is surely true that bad thoughts may be a gateway to bad actions and that many bad thoughts are wrong primarily because of what they cause.<sup>11</sup> But it seems to me that this is at best an incomplete explanation of the apparent immorality of certain thoughts.

First, it is not clear that this sort of explanation can cover the diversity of cases in which there appears to be a moral obligation to think certain things. For example, Murdoch’s M and D example is carefully constructed so that M’s thoughts do not have any external effects.

More generally, the consequentialist response makes the obligations of thought seem too contingent. More often than not, thinking bad thoughts may lead to bad actions, but there may be cases where entertaining bad thoughts does not have this consequence and yet still seems wrong. For example, one response that I have

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<sup>11</sup> Note that the consequentialist explanation requires that the agent take a somewhat odd stance towards herself. Under this explanation, the agent will only take herself to have an obligation to avoid a particular thought if she believes that thought would cause her to do certain acts X which she ought not do. In other words, she must take herself not to be under control of whether she will do X. We do, no doubt, assume such an attitude towards ourselves sometimes, but it is an abdication of agency—“if I let myself do this, then I will unavoidably do that.” For the agent who takes the decision to X to be fully under his control, the consequential reason not to think the thoughts that may lead to X will not be available.

frequently received to the claim that certain thoughts are immoral is that people are better off allowing themselves to engage these thoughts than repressing them. This Freudian response makes it less obvious that bad thoughts should be avoided because they lead to bad behavior. Allowing oneself to engage in hateful thoughts could conceivably be a way to avoid outbursts of actual violence, but it is not clear that this would eliminate all senses in which the thoughts are wrong.

A third problem, at least for a straightforward consequentialist explanation, is that the enjoyment that an agent gets from certain bad thoughts could plausibly be large enough to outweigh slight impairments in behavior. For example, someone might get great pleasure from his perverse sexual fantasies about a coworker at the expense of only a minor increase in awkwardness during workplace interactions. But it does not seem like the impermissibility of the fantasy depends on how the consequences balance out. And this is not simply because one's own welfare can never be grounds for slightly impairing one's interactions with others. If I can avoid pain by taking a steroid, which will give me a slightly increased propensity for anger or violence toward those around me, including my coworkers, that need not be impermissible. But violent fantasies seem wrong, even if the costs and benefits balance out just as they do with the steroid.

Finally, it seems to me that one can have an obligation to think in a particular way even when it positively impairs one's external actions. Imagine that young husband, H, and wife, W, learn that W has an incurable disease. In their final months together, they have a number of discussions about what H will do when W is gone. W repeatedly insists that H should not feel bad about moving on and insists that

she hopes he is able to find love again. She asks only that H promise that he will think of her every day for the rest of his life. H, of course, is happy to make this promise (and assume that it is a very explicit promise—not mere words). After a few years, H does remarry. His new wife, N, appreciates the importance of W to H and never in any way discourages H from maintaining her memory. Still, H now finds himself uncomfortable thinking of W. He finds that the memories make him morose; they become intrusive distractions from his work and his personal life; he is not as good a husband to N when he thinks of W. So H decides to stop thinking of W.

It seems to me that H is violating an obligation. I do not think, however, that the thoughts are required because of the way that they will affect H's external conduct. In fact, it may be true that the thoughts are a mild distraction or impairment. If this is correct, then one may have an obligation to think certain things even when the overall effects are not positive.<sup>12</sup> So it seems like the external effects of our thoughts cannot fully explain our obligations regarding them.

### 8.2.2 CULTIVATING MORAL CHARACTER

A second response is that one has certain obligations concerning one's mental activity because one has a duty to cultivate one's moral character. Having a good moral character involves having the right moral emotions and dispositions, and

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<sup>12</sup> I think this is true even if it means that H is somewhat impaired in performing his duties at work or at home. In such cases, there will be two competing duties. While the duties of certain thoughts may often give way in such cases, I do not think that they automatically do so. I therefore disagree with Frances Kamm's assessment: "But if the act is not only permissible but one's duty, one should put doing the act before avoiding actualizing one's capacity for having efficacious inappropriate intentions that will lead to the act" (2006, p.178 n.15).

these emotions and dispositions must be built through appropriate internal activity.

If one is not careful, this idea may simply reduce to a form of the consequentialist account above. That is, if the reason that one must cultivate a good moral character is because the external effects of one's behavior will be better, then this account does not add anything other than a description of the causal mechanism. But the picture need not be consequentialist. One might think that one simply ought, in virtue of being a moral agent, develop one's moral capacity. The person who entertains malicious thoughts is stunting her own moral capacity; she is willfully making herself a worse person. She is thereby acting against her own nature or with disrespect for her own humanity.

I do not doubt that there is such an obligation to cultivate one's moral character and dispositions. Insofar as immoral thoughts impair this development, this offers a reason why one ought not think such things. Still, it does not appear to me that this duty to cultivate one's moral character can explain the ways in which morality seems to govern thought.

First, this explanation makes the obligations of thought appear to be general and flexible. In the *Groundwork*, Kant classifies the duty to cultivate one's talents as an imperfect duty (1997, 4:423), meaning that it is a policy that we should pursue but not necessarily at every available opportunity. In *The Metaphysics of Morals*, Kant describes the duty to cultivate morality as "wide" (1965, 6:393), meaning that it is something that each individual has latitude in determine how he or she will fulfill it. These classifications of the duty to cultivate oneself seem right—the duty

imposes a general and flexible sort of obligation on us, but it does not narrowly proscribe any particular act. I may have an obligation not to let my life and capabilities go to waste, but this doesn't mean that I can never indulge in some counterproductive frivolities. I probably shouldn't let myself get fat and useless, but a donut now and then isn't morally objectionable. The kind of bad thoughts that I have been describing, however, do not seem to be like mental donuts. Rather, the obligations against them seem to provide strict prohibitions. Indulging in a racist thought seems to be violating a specific requirement. So, while it is very plausible that we have a duty to cultivate ourselves and that this duty does require certain kinds of mental activity, it doesn't seem like such a duty could be strict enough to capture all of our obligations to avoid certain thoughts or fantasies.

Second, this account doesn't reflect the way the duty is owed to someone. The duty to cultivate one's moral capacities is owed to oneself, or to God, or to humanity generally. But at least some duties of thought are owed to others. I think the fact that such duties of thought can be owed to another is especially clear in the example of the husband's promise. The duty in that case is acquired through a promise and, like other promises, its performance is owed to the promisee. The more common case, however, is where a thought is owed to the person who is its object out of respect for that person. M owes it to D to see her justly. Othello owes it to Desdemona not to distrust her. And you owe it to your friend not to believe that he killed Cock Robin.

To emphasize the way that these duties are owed to others, consider two further characteristics. First, the moral character of a particular thought will be quite dif-

ferent if the person in it is real or fictitious. As a boy growing up, I had something of a crush on Maid Marion. Now suppose that I engaged in some moderately extensive fantasizing and daydreaming about Maid Marion. If it wasn't too consuming or perverse, then it seems fairly innocent, I think. But the same fantasies, if they are about the girl who lives down the street and has no idea, may have a rather different character (although not necessarily wrong). The difference is that there is a real person to whom I owe respect. As a result, the obligation takes on a more strict and directed quality.

Second, the fact that obligations of thought are owed to the person whom the thought concerns is illustrated by the fact that a person's action can alter the character of the obligations. I may owe my female coworker a duty not to think of her as a sexual object, while at the same time I may not owe such a duty to Britney Spears. The difference, I think, is that Britney has made millions by permitting herself to be thought of, at least within certain bounds, as a sexual object. Sexually objectifying anyone may be bad for my moral character, but the duty to my coworker has to do with her and not with me.

### 8.2.3 REFLECTING BLAMEWORTHINESS, NOT PERMISSIBILITY

A third possible explanation is that bad thoughts appear impermissible because of the way that they reflect fault in the agent. That is, bad thoughts are a reflection of bad moral character. They are not actually impermissible, but they appear to be because we can be faulted for them. In order to get this explanation off the ground, of course, one needs an account of fault that is detached from permissibil-

ity. T.M. (Scanlon, 2008) has defended a view like this about an agent's intentions that might be generalized to other mental states. For Scanlon, an action's intention can determine the meaning of the action. The meaning of an action can cause others to change their intentions and expectations with regard to that agent. This, for Scanlon, is blame. Extending such an approach to thoughts would allow us to say that we may blame the racist for his thoughts—that is, we may alter our relations with him—even though his thoughts are themselves permissible. The person who thinks that thoughts alone can be impermissible has simply confused permissibility with blameworthiness.

Assuming that this is what blame amounts to, I do not doubt that one's mental activities do reflect features of the person's character that may justify amending our intentions and expectations toward that person. Moreover, blameworthiness can provide a partial explanation for the (presumed) illusory appearance of impermissibility. Consider Kamm's Bad Man. One might alleviate the sense that he acts impermissibly by pointing out that he is still blameworthy. Moreover, this will reflect back onto his deliberations: from his vantage point, killing his enemy may *appear* impermissible because other might blame him. The appearance of impermissibility, here, is really the result of blameworthiness.

Perhaps this might similarly explain my first-personal sense that I ought not think certain things, but I have my doubts. Consider what I said about the husband's promise above. It seems to me that H owes an obligation to W to think of her. We can imagine H saying to himself, "I ought to think of her more." We might try to recast this as, "I am a bad person for not thinking of her more," but it may be



the case that H is, as the example tried to intimate, a better, less morose person in general for not thinking of her. A better attempt to recast the apparent norm of permissibility might be, “I am destroying my relationship with W by not thinking of her.” Still, this makes the reason that H takes himself to have to think of W contingent on valuing the relationship. He might respond by deciding, regretfully, that it is time for him to cast off his relationship with W. But I think that the obligation will appear less optional than this. In short, I don’t think an account like this can fully capture either the force or the directedness of obligations of thought.

Of course, an appeal to blameworthiness is not meant to capture these things entirely. It is meant to explain an illusion of impermissibility on the assumption that it is, in fact, an illusion. As such, the account will depend on an argument that thoughts are not actually impermissible. This is essentially the structure of Scanlon’s arguments about intention. We come to the account of blame only once we see that having a bad intention isn’t really impermissible. With impermissibility off the table, then the account of blame gets going. Scanlon argues that the reason that having a bad intention is not impermissible is because what reason someone acts on is not within his or her choice. This is a two-stage argument. First, Scanlon argues that the question of permissibility only applies to matters of choice. He writes,

The question of permissibility is the question, “May I do X?” which is typically asked from the point of view of an agent who is presented with a number of different ways of acting. The question is, which of these may one choose? The question of permissibility thus applies only to alternatives between which a competent agent can choose. (2008, p.30)

In other words, we can only say that something is impermissible if an agent had some alternative that he could choose. But this fact, Scanlon thinks, means that what reason someone acts on cannot be impermissible:

The suggestion is that it might be impermissible either to bring about a result with certain bad reasons in mind or to fail to bring it about at all, and that the only thing that would be permissible would be to bring it about for the right reasons. If I am correct about the connection between permissibility and choice, this makes sense only if acting for those different reasons is something the agent can choose to do. I do not believe that such a choice is possible. (2008, p.31)

To sum up the argument: something is impermissible only if something is a matter of choice; an agent can only choose what to do, not what reasons to act on; therefore, it is not impermissible to act on the wrong reasons. The Bad Man, for example, could only choose to switch the tracks or not—he couldn't choose the compound [switch the tracks in order to save the five].

I am not convinced. Scanlon's argument seems to me to rely on eliminating the activity of choosing and focus only on the choice made. Consider the analogous argument for mental activity. Suppose I think that you killed Cock Robin because I think that you have a sinister look about you. You did kill Cock Robin and the bloody feathers are all over the ax lying on your front porch. But I have come to the right belief for the wrong reasons. Should we say that my belief is impermissible? Scanlon's argument would suggest that it is not. After all, I can't choose to believe something for a particular reason.

But it seems to me that what we want to say is that I have made an impermissible inference. My activity in going from reasons to conclusions has been faulty—my

reasoning was impermissible. We can say this because the agent can ask the question “Should I reason in this way?” Recall what Murdoch says: M has been active in changing her opinion.

Of course, this analogy runs into the questions about doxastic voluntarism and the ethics of belief that I vowed to avoid. But that is really not essential; we can focus on a case of mental activity other than belief formation. Suppose I harbor a strange fantasy involving killing my neighbor silently in his sleep. I contemplate various ways that I might be able to snuff the life out of him without his ever knowing it—chloroform and carbon monoxide dance in my head. As it would happen, however, my neighbor has a terrible terminal illness that has put him in a great deal of pain. For religious reasons, he wouldn’t take his own life, but he longs for it to be over and would welcome death. Assume that this fact would be a good enough reason for someone who cared about him to at least *think about* ways for assisting him in reaching a painless death. But it’s not my reason. My reason is based on some perverse pleasure that I would find in it. I think we should say that my thoughts in this case are impermissible, even though there would be an alternative basis for permissibly entertaining the same thoughts.

Return now to the Bad Man. Scanlon claims that we do not choose what reason we act on when we choose to act. This seems plausible. But choosing itself involves a form of conscious mental activity—at least some of the time. Choosing often involves entertaining arguments, attending to particular facts, contemplating various options, and so on. The Bad Man presumably engaged in the same kind of murderous thoughts that I entertain regarding my ill neighbor. Shouldn’t we

say that, like my thoughts regarding my neighbor, the Bad Man's thoughts regarding his enemy are impermissible—even if they do lead to unobjectionable external conduct? True, the Bad Man cannot choose the compound [switch the tracks in order to save the five, not because I hate my enemy]. But the Bad Man can choose not to entertain the thought that killing his enemy is desirable. He can choose not to engage in a certain forms of reasoning. In Scanlon's picture, this deliberative activity drops out. But this is precisely where the impermissibility occurs. The Bad Man acts impermissibly insofar as his mental activity—his practical reasoning—has been impermissible. He has not attended to the reasons that he has, and he has allowed himself to think in ways that he ought not. This may be true, one might say, even though his physical act in switching the tracks was not objectionable.

#### 8.2.4 TWO ACTIONS

I have argued thus far that one cannot explain the apparent moral prescriptions against having certain thoughts through derivative or deflationary accounts. That is, there genuinely are obligations against entertaining certain thoughts. These obligations are not derivative results of external effects the thoughts might have on external action. And these are genuine obligations—things I ought not do—not merely apparent obligations that are shadows of the idea of moral character.

There is, I think, a plausible reply at this point, which is suggested by the discussion of Scanlon above. One might believe that morality applies to thoughts for a relatively straightforward reason: morality applies to the internal realm as well as the external realm because action occurs in the internal realm as well as the exter-

nal. This is essentially Aquinas's picture—there are both mental and physical acts. Morality applies to action, but this may include an act of the mind as well as an external act.

This division allows a clear explanation of the cases described previously. My act of fantasizing about killing my neighbor is impermissible, even though it does not involve any external action. And we can then say the same thing about the Bad Man. His interior act is immoral—that is, the mental activity behind deciding to kill his enemy is activity that he ought to avoid—but his exterior, physical act—switching the tracks—is not immoral.

Perhaps this is the correct response. I do believe that we choose to do certain things with our minds as well as with our bodies and that recognizing this is important. Still, I am not sure that starkly dividing actions up between mental and physical is quite the right way to think about these matters. First of all, the division of separate actions can seem a bit artificial. Intuitively, the Bad Man does one action, not two. The mental activity—the contemplating, envisioning, entertaining, reasoning, and ultimately deciding—and the physical movement are all part of the same action. Moreover, dividing the Bad Man's conduct into mental and physical movements would create a doubling problem for ordinary bad actions. Every premeditated malicious action would actually be two immoral acts—an internal one and an external one. Or at least two. If we are going to say that the mental activity was impermissible but the physical activity was not, why stop there? We could say that some of the mental activity leading up to switching the tracks was impermissible and other of it was permissible. There could be any number of "actions," some

permissible and others not.

As I said, however, I'm not convinced that that this isn't the correct response. The points that I just raised give me pause, but they may not be conclusive. Still, I wonder if there might be a more compelling way to capture the idea that the Bad Man acts permissibly, and also capture the idea that I don't act permissibly when I imagine killing my neighbor.

### 8.3 UNCLAIMABLE DIRECTED DUTIES

MY STRATEGY IS TO DISTINGUISH two ways in which an obligation may be owed to another person. These two forms of obligation correspond with two different senses of fulfilling one's obligations and, in some sense, with two different ideas of permissibility. As a result, in one sense—what I think of as the primary sense—both the Bad Man's action and the bad thoughts constitute impermissible and immoral action. In the other sense, however, neither the Bad Man's action nor the bad thoughts are impermissible.

Both ideas about permissibility have already arisen in what has been said. First, it seems to me that we owe duties of thought out of respect for the other person and out of an obligation to give proper attention to reality. Moreover, these duties seem to be owed to the other person. It is not just that I ought not think  $x$ , but that I owe it to you not to think  $x$ . By thinking  $x$ , I may *wrong* you.

On the other hand, in spite of this sense that there is an obligation owed to the other person, there is a lingering sense that these obligations are different than other obligations that we owe to each other. Although these obligations seem to

be owed to the other person, one might be reticent to call them *claims* or *rights*. This reticence arises, I think, from the thoughts that these obligations do not have the form of something that we can demand from others.

I want to suggest that the both of these ideas—the sense of wrongness and the reticence to ascribe a right—are correct. More particularly, I want to say: (1) we have a strict duty not to think of others in particular ways and that duty is owed to the other person out of respect for them, and yet (2) the other person cannot necessarily claim or demand that we fulfill this obligation. In other words, obligations of thought are directed duties, but they are not subject to the claims and demands of those to whom they are owed. The duty is owed to the other person, but it is not theirs to demand.

This suggestion may sound mysterious at first. If something is owed to someone, isn't it that person's right? In one sense, perhaps. But there is another sense of having a right that is bound up with a special form of activity—*claiming* or *asserting* the right. As Joel Feinberg puts it, "there is no doubt that [rights'] characteristic use and that for which they are distinctively well suited, is to be claimed, demanded, affirmed, insisted upon" (1970, p.252). Claiming, or asserting, a right isn't simply a matter of asserting that something is the case. One can, of course, assert that one is owed ten dollars in the way that one might assert that one lives on Oak Street or that one's brother is a drunkard. This kind of assertion merely offers a description, and anyone could offer these descriptions of the world. There is, however, a more unique, normative way that one can assert that one is owed ten dollars. When I assert that you owe me ten dollars in this sense, I am not merely describing a

purported fact, but I am purporting to give you a reason to act. I am attempting to exercise a power or authority with regard to you. It is predicated on my having a certain prerogative with regard to your use of the ten dollars. This kind of assertion of a right—making a claim on another—is something that only I, as the person owed, can perform.

The idea that rights are bound up with the activity of asserting or claiming would suggest that having a right might be understood in terms of being situated to engage in this activity. To have a right, in this sense, simply means being able to perform this distinctive activity. As Feinberg puts it, “having a claim consists in being in a position to claim” (1970, p.253). In this sense, the activity is primary and the right is dependent on the activity.

When we think of rights in this way, we can readily make sense of the idea that something could be owed to a person without that person having a right to it. This circumstance will arise where there is some disability to asserting or claiming or demanding what one is due. One example of this is gratitude. We generally think that gratitude is owed to a benefactor and yet gratitude is not that person’s right. If I saved your life once, you may *owe it to me* to give me assistance if you are subsequently in a position to help me. Nevertheless, it may be something that I cannot *demand* or *claim as a right*.<sup>13</sup> Something similar, I believe, is true about thoughts. Our reticence to call the obligations of thought a matter of rights relates, I think, to

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<sup>13</sup> See Adam Smith (1869, II.ii.1): “The man who does not recompense his benefactor, when he has it in his power, and when his benefactor needs his assistance, is, no doubt, guilty of the blackest ingratitude... His want of gratitude, therefore, cannot be punished. To oblige him by force to perform what in gratitude he ought to perform, and what every impartial spectator would approve of him for performing, would, if possible, be still more improper than his neglecting to perform it.”



the idea we are not in a position to demand or lay claim to other people's thoughts. Our power to engage in these activities, for some reason, does not generally extend into the minds of others.

Why can't we engage in the activity of making claims with regard to each other's thoughts? It cannot simply be due to the fact that we do not know about each other's thoughts because we might learn and because, in other contexts, we can have claims even when we are in ignorance of them. I will very roughly sketch two possible answers.

First, one might draw on the parallel with gratitude. Gratitude, by its very nature, seems like it must be given, not demanded. It is built into the concept that it cannot be demanded or claimed as a matter of right. Gratitude that isn't freely given isn't really gratitude at all. One might think that something similar is true of respect. It is a modern slogan that "respect cannot be demanded, it must be earned." If so, then perhaps, as a conceptual matter, we cannot demand that others respect us in their thoughts for whatever we could demand as a right would not be what we deserve, which must be freely given.

A second possibility would be to think that there is something like a protective shield of privacy around our mental life. The idea would be that no one has power or authority over another person's mind. According to this line, it is a substantive moral principle that we cannot make claims or demands about what each other think.<sup>14</sup> Of course, these are just sketches of possible explanations for why we are

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<sup>14</sup> Along these lines, one might note that demanding certain thoughts as a condition for a relationship like friendship might be less problematic. What one cannot do is make a moral demand for certain thoughts. I am indebted to Tim Scanlon for this point.

unable to make claims on each other's thoughts, and much more would need to be said. I suspect, though, that one or both of these ideas is correct.

Separating what is owed and what can be claimed allows an explanation of the Bad Man. The Bad Man acts wrongly, although he does not act in a way that is contrary to some claim of his enemy. In Thomson and Kamm's argument against the doctrine of double effect, the question is supposed to be whether the action in question is permissible. If that question is understood as a first-personal deliberative question, then I think the answer should be "no." Try to imagine yourself as the Bad Man. You see that you could switch the tracks, and you see that it could be justified as saving the five people in danger. It occurs to you, "Now is my chance to kill him." It seems to me that you are morally obligated to reject this thought. You ought, at this point, to say to yourself, "No, I should not contemplate *that*." His failure to do this is, after all, why he is a bad man. I don't believe that we should think of this as merely an evaluative claim—it seems to me that he acts *wrongly*.

But the Thomson/Kamm argument makes sense because there is another way to understand the question of permissibility. "Is this permissible?" might mean "Can anyone claim that I not do this?" or "Does anyone have a demand that I not do this?" This is, in a way, a different sense of permissibility. When another person has a claim on us that we do something, there is a special way in which acting contrary would not be permissible. To do so would be to violate the claim. In the Bad Man example, if this is the question, then the action does seem permissible. What makes Kamm's Bad Man a convincing case is the fact that he kills his enemy *because* he knows that nobody can demand that he act otherwise. His action is re-

sponsive to the claims that others can make on him. Insofar as the Bad Man does not violate anyone's claims, there is a sense in which the bad man acts permissibly.

My suggestion, then, is that we can say that an intention is impermissible in the first sense, but at the same time deny that that it is impermissible in the second sense. That is, as an agent deliberating, I ought not engage in these thoughts, but at the same time others do not have a claim on my thought process but on my actions.

Once we detach the first-person deliberative question from the further question of whether others can make a claim on us, I think it is less mysterious how thoughts can be immoral (even in the directed-duty sense). Others cannot place claims on what I do in my mind, but this should not stand in the way of my having certain duties to them out of respect for them. Recall that a unifying theme behind the philosophical resistance was the sense that thoughts do not bear on others in the relevant way. There turns out to be some truth in this idea. But it is not that thoughts are too detached from the world for us to have duties regarding them, but rather that the world at large is not in a position to lay claims on us pertaining to our thoughts. In short, thoughts can be owed even though they are not something others can demand.

To drive this idea home, consider two examples from other philosophers where the rough outline of this distinction begins to come through. First, recall Thomson's characterization of her intuitions regarding the Cock Robin example: "I think we might in the ordinary way say I wronged you and did you a wrong, though it can hardly be thought that my merely harboring that thought was my violating

a claim of yours” (1990, p.122). Thomson is only noting that our linguistic intuitions about “wrong” do not track perfectly the idea of a claim-right. But one might take the insight seriously and think that there can be directed duties even when the other person cannot make a claim. Second, consider the following example from Kamm, used to argue against Raz’s account of rights: “[I]f I have a duty to help you by praying to God for your recovery, you still might not have a right that I relate to God in this particular way” (2002, p.483).<sup>15</sup> Kamm, here, is clearly imagining that you might have a duty to another, and yet that other person might not have a right—a claim—to your performance. The example works because we feel that this is a realm where one person is not entitled to demand things from another—you cannot dictate how I ought to relate to God. Although there may be an obligation, it is not the sort of thing that we can demand or claim and, in this sense, is not a right.

If this overall picture is correct, I think there is an important insight about our obligations to others. Typically, the philosophical concepts of respect, rights, claiming, wronging, and directed duty all seem to come and go together. In our thoughts, however, the questions about the rights, claims, and demands of others are removed. I think the residue is philosophically illuminating. Even where others may not be able to lay claims on us, we still owe them an obligation to think of them justly and accurately. We may still fail to give others their due, and we may, in this way, wrong them.

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<sup>15</sup> I should say that I find this a very difficult example to think about. I don’t mean to be endorsing Kamm’s argument here, but only to point out how she divides the directed duty from the right.

*After he had said this, Jesus was troubled in spirit and testified, "Very truly I tell you, one of you is going to betray me." His disciples stared at one another, at a loss to know which of them he meant. One of them, the disciple whom Jesus loved, was reclining next to him. Simon Peter motioned to this disciple and said, "Ask him which one he means." Leaning back against Jesus, he asked him, "Lord, who is it?" Jesus answered, "It is the one to whom I will give this piece of bread when I have dipped it in the dish." Then, dipping the piece of bread, he gave it to Judas, the son of Simon Iscariot. As soon as Judas took the bread, Satan entered into him. So Jesus told him, "What you are about to do, do quickly." But no one at the meal understood why Jesus said this to him.*

John 13:21-29

# 9

## An Argument from Waiver

MOST OF THE TIME, BOTH RIGHTS AND COMPLAINTS can be voluntarily relinquished. With regard to both relations, we typically refer to this as a waiver. I can waive a right or I can waive a complaint, meaning in both instances that I give up something that morality would otherwise afford me. This chapter focuses on the divergence between these different forms of waiver as an argument for seeing a

divergence between the relations that are being waived.

### 9.1 WAIVER, PERMISSION, AND FORGIVENESS

WE HAVE IMPORTANT MORAL PRACTICES built around waiving both rights and complaints. When a right is relinquished, the waiver operates as a grant of permission to the person who was previously under the right's correlative duty. For example, if I have a property right to exclude you from using my well and I waive that right, then I have made it permissible for you to draw water from the well. When a complaint is relinquished, the waiver operates as a grant of forgiveness.<sup>1</sup> For example, if you have injured me by cutting down my apple tree without permission but I forsake any complaint against this trespass, then I have essentially forgiven you for the wrong you have done me.<sup>2</sup>

Both granting permission and forgiving are performatives (Austin, 1962). They are speech acts that effect a change in our moral relationships. Granting permission does so by relieving a duty that another person owed to the speaker. In this way, it dissolves the right that correlates with that directed duty.<sup>3</sup> Forgiving changes

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<sup>1</sup> Something like this idea is famously found in Bishop Butler's *Fifteen Sermons* (1726), in which he seems to argue that forgiveness involves giving up one's resentment and revenge. This idea has been picked up by the majority of modern commentators. Ernesto Garcia (2011) offers a valuable criticism of this reading of Butler. Garcia argues that Butler only believes that forgiveness involves giving up revenge and malice, not resentment. My view is that, even if forgiveness does not require giving up resentment, it does involve giving up one's position to complain.

<sup>2</sup> I think that this is true even if one forsakes the complaint out of a concern for some third party or for one's own sake and not out of any sympathy for the wrongdoer.

<sup>3</sup> When speaking about waiving a right, one must take care in specifying the generality of the right being described. Granting permission corresponds with waiving a Hohfeldian claim-right, but not with waiving a more generalized right. If I grant you permission to kiss me, I have removed your obligation not to kiss me. I have, in this way, given up a Hohfeldian claim-right, namely the claim that you not kiss me. But I have not thereby given up my more general right

our moral relationships by making it the case that the speaker can no longer condemn the forgiven person.<sup>4</sup> In this way, it dissolves another aspect of our moral landscape, namely a complaint or a wronging (Owens, 2012).<sup>5</sup>

These two performatives—granting permission and forgiving—are different activities. In particular, they are performed at different times, relatively speaking. A grant of permission typically occurs before the action in question is undertaken, whereas the typical time for forgiving is after the action in question has been completed.

If one accepts the view that rights and complaints are necessarily connected as reciprocals of one another, then the distinction between granting permission and forgiving will end here. More precisely, such a view will take this difference in temporal perspectives to be the singular and essential distinction between waiving a right and waiving a complaint.

To see this point, some metaphor is helpful. The picture of rights and com-  
to decide who can kiss me, of which the aforementioned Hohfeldian claim-right is just one instance. I focus on granting permission—and thus on waiving Hohfeldian claim-rights—because it provides the appropriate parallel with complaints and wrongings, which are focused on a particular actor and action. So, when I am discussing waiving a right, I am talking about waiving a right that X do  $\phi$ . This should not be confused with waiving all right that anyone do  $\phi$ , which can sometimes be implied by the same locution.

<sup>4</sup> We also have another idea of forgiving that is not a performative. In this sense, one can forgive a person in one's heart alone, without ever doing anything. This is not my subject here. I am interested in forgiving insofar as it involves waiving one's complaint. This also means that I am interested in the forgiveness that is exclusive to a wronged party. We sometimes speak of forgiving those who have wronged others—"I cannot forgive what Mao did to the farmers"—but this is forgiveness in the sense that is not my topic. For a further discussion of this difference, see Downie (1965).

<sup>5</sup> Owens maintains that forgiving makes it the case that third parties, in addition to the party who forgives, can no longer condemn the wrongdoing. I am skeptical of this claim. Either way, though, I am interested in forgiving insofar as it involves making it the case that one cannot complain oneself.

plaints as binding together two moral agents affords a natural rendering of what happens when there is a waiver. If rights represent a sort of normative connection between two parties—“an arc of normative current passing between the agent-poles,” as Michael Thompson puts it, “like the opposing poles of an electrical apparatus” (2004, p.335)—then waiver can be viewed as the cutting off of that connection by one side—or, in Thompson’s metaphor, as one pole’s charge being removed and the current therefore ceasing to flow. Of course, not just any disconnection will count as a waiver. It must be accomplished by the right-bearing or complaint-bearing party. If the connection is disrupted by outside forces, then it will not count as waiving the right or complaint. In this sense, an apt metaphor may be that waiver is like unleashing—something that can be done only by the leash holder and not by the dog or a gust of wind. But regardless, the representation of rights and complaints as connecting pairs of moral agents implies a representation of waiver as the disconnecting of moral agents. This is, I think, a very natural and helpful way to understand waiver.<sup>6</sup>

This image of morality as uniquely binding two parties together can be joined with the idea that rights and complaints are part and parcel with one another—the familiar foe of this dissertation. According to this idea, the important thing is not simply that rights and complaints are both two-sided relations that bind together moral agents. It adds that these ties are fundamentally unified. As Darwall puts it,

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<sup>6</sup> The talk of “disconnecting” shouldn’t be taken to mean that all connection between the agents is necessarily cut off. Many particular rights come in bundles. If I waive my right to exclude you from taking my well water today, that doesn’t mean that I waive my right tomorrow. My right to exclude you, in general, may be viewed as a bundle of more particular entitlements. One can cut a particular strand without cutting the entire rope.



“It is part of the very idea of a moral demand that we are accountable for complying” (2009, p.99). Agents that are bound up in a rights relation are, according to Darwall, also bound together with regard to holding accountable. There are not two separate connections; they are one and the same.

If this is correct, then there is an important sense in which waiving a right and waiving a complaint both constitute a release of the same connection. Insofar as a moral demand and holding accountable are part of the very same idea, then giving up a moral demand and giving up on holding another accountable will be part of the very same idea. Both are forswearing the same normative bond.

The only difference, then, will be the timing. Waiving a right operates prospectively, morally disconnecting going forward. Waiving a complaint operates retrospectively, morally disconnecting after the fact. This is not an implausible view. It is not hard to see granting permission and forgiving as conceptual siblings—both essentially involving the same sort of personal moral release. And people do make this connection. For example, Piers Benn argues that one can only forgive on one’s own behalf, “much as I can offer someone my own services, but not the services of another without first gaining their permission” (1996, p.380). Or, to take a less high-brow example, this parallel seems to be presupposed by the slogan, “it is easier to ask for forgiveness than permission.”<sup>7</sup> Either way, the idea is that permission and forgiveness are different manifestations of what is ultimately the same release.

This chapter argues that this is not true. Waiving a right and waiving a complaint are not the same interaction, just occurring at different times. Or, to put

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<sup>7</sup> This quote has been widely attributed to Rear Admiral Grace Hopper, but it has become a ubiquitous motto for taking initiative.

the point another way, forgiving is not the same as retrospectively granting permission, and vice versa. I reject the idea that both remove the same normative connection. Waiving a right, I contend, is the release of something different than waiving a complaint. Insofar as this is true, it suggests that rights and complaints constitute different kinds of moral connections between persons.

## 9.2 PREEMPTIVE WAIVER OF COMPLAINTS

PREVIOUSLY, I SAID THAT WAIVER OF A COMPLAINT typically happens retrospectively, whereas waiver of a right occurs prospectively. Some writers view the timing as a necessary condition for these practices. For example, one writer explains,

Forgiving someone for something is quite a complex act, as can be seen from the fact that the utterance ‘I forgive you for doing A’ only has its full intended illocutionary force if a number of conditions are satisfied. In the first place, it must be the case that you have already done A—I cannot forgive you for what you have not done (although I can either predict that I shall forgive you if you do A, or give you permission to do it, thus removing any question of having to forgive you for it in the future). (Londey, 1986, p.4)

This quote captures the thought that, necessarily, forgiving is retrospective, and that granting permission is its prospective analog. I believe that this is not correct. This temporal ordering may be typical, but it is not necessary. In particular, I mean to suggest that one can waive a complaint preemptively. That is, contrary to the above writer, one can forgive a trespass even before it occurs.

Certainly, our linguistic practices support this idea. In this vein, people say things like, “I won’t hold it against you” or “I forgive you if...” or “You won’t hear

me complain” or “I wouldn’t have a problem with it.” Ostensibly, these locutions seem to be instances of forsaking one’s entitlement to hold another accountable before the action in question takes place. Although more natural, such statements need not be phrased in the future or the subjunctive as the above instances are. For example, a legal document might state, “I hereby waive any complaints that should arise.”

But ordinary language is hardly decisive, and one might insist that these aren’t truly examples of waiving a complaint or forgiving. In fact, the existence of these ways of talking might seem to lend credence to the idea that waiving a complaint and waiving a right are bound up with one another. After all, locutions like these seem to be ways of granting permission. “You won’t hear me complain” could be a colloquial way to say, “you have my permission.” Reading significance into the difference would just be parsing words. If that’s correct, then it looks like waiving a prospective complaint converges with waiving one’s present claim-right.

I mean to resist this view. Before turning to that argument directly, however, it is worth noting an asymmetry that should at least strike the proponent of the view as a bit puzzling. Although we certainly do use the language of waiving complaint as a way of waiving rights, we do not seem to do the reverse. That is, we don’t express giving up a complaint in the language of retrospectively granting permission. Not only do we not do this, but the very idea seems deeply incoherent. The sentence, “I permit you to have done that,” is not uncommon, but incoherent. We might, of course, say, “I would have let you do it,” which invokes a notion of hypothetical consent from a retrospective stance. But saying this is not the same as ac-

tually granting permission retrospectively. In this sense, it is not really analogous to saying, “I wouldn’t complain,” which is not merely a prediction but a change in the moral relationship. This asymmetry begins to suggest that there is something special about giving permission—that is, about waiving a claim-right—that amounts to something more than canceling accountability.

This difference is evident in practice. Although, as noted above, it is often the case that preemptively relinquishing one’s future complaint functions as a grant of permission, I don’t believe that this is always true. Sometimes, “I won’t complain” means only that—and falls short of truly altering permissibility.

If one accepts the argument concerning third parties in Chapter 4, then this should be readily apparent. A third party cannot waive a right that he or she does not have, but a third party may be able to waive a future complaint. For example, a mother cannot generally waive any right that her daughter not be injured by some action, but a mother could forgive someone who has injured her daughter. Thus, to the extent that one accepts that rights and complaints can come apart, then their waiver will also be able to come apart. In this chapter, though, I mean to use the difference between permitting and forgiving to lend further support for the thesis that rights and complaints are conceptually separate, so appealing to the third-party cases like this would be begging the question.

I believe that waiving a right and waiving a complaint can come apart even when a party holds both the right and the potential complaint (unlike the mother, who has only the latter). Consider an example. Suppose that two soldiers are on patrol, when an explosive device wounds one of them. Although the camp is only a few

miles away, the wounded soldier is simply unable to get down the steep hillside, even with the other soldier's help. They are able to call for assistance, but they are informed that it will be several hours before aid can be dispatched to their location. The unharmed soldier promises that he will stay by the wounded soldier's side until help comes. But after an hour of sitting in the cold rain, the unharmed soldier is visibly shivering uncontrollably. Moreover, they hear gunfire and worry that their position may become dangerous. The wounded soldier says, "I won't hold it against you if you leave me." The soldier leaves.<sup>8</sup>

One might say that the soldier has acted wrongly by leaving. He has broken his promise and abandoned his comrade. Insofar as he has acted wrongly, it is because he has violated the obligations that he owed to his fellow soldier. But how can we make sense of this evaluation in light of the wounded soldier's statement? It cannot be a violation of the soldier's obligations if the other soldier released him from those obligations. One possible response is to say that he didn't really mean it. That is, one might understand his statement only to look like a waiver of the obligations owed to him but to be, in reality, just an expression of gratitude ("I know that you are sacrificing for me."). This is not implausible and might, in some situations, be the correct understanding. But it has the disadvantage of refusing to take the fellow soldier's statement at face value. Although he said that he wouldn't

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<sup>8</sup> Here is an alternative example: Suppose that you promise a friend that you will stay by his side through a difficult medical procedure and the ensuing recovery. Your friend warns that it will be unpleasant, but you assure him that this is what friends do for one another. When in the operating room, however, you discover that the procedure creates a nauseating odor. The room is stuffy, and your mother keeps sending you text messages with concerns that are not terribly urgent. Although clearly in some distress himself, your friend sees that you are very uncomfortable and distracted. He declares, "I won't hold it against you if you need to leave." You take the opportunity to escape the unpleasant situation.

hold it against the soldier, it turns out that he perfectly well could hold it against him.

I want to suggest that there is another possibility. We can think that the wounded soldier, in this situation, has waived his future complaints and yet has not waived the obligations that are owed to him. This possibility takes the wounded soldier's statement at face value: he won't hold it against the other soldier. But it does not treat that as equivalent to waiving the right, i.e., the duty that you owed to him. If one assumes the strong conceptual linkage between rights and complaints, then there are really only two possibilities—either the statement had no real moral significance or it was a waiver of the duties owed to the wounded soldier. My claim is that there is an intermediate possibility. The statement did not waive the duty, but it did waive future complaints based on a violation of that duty. Note that it would still be appropriate for healthy soldier to apologize, but that his wounded companion is bound to accept your apology or even to treat it as not required. In this sense, the example represents forgiving preemptively. The statement doesn't make it permissible for the soldier to leave, but it waives any complaint if he does—that is, it forgives him if he does.

This idea of preemptively forgiving is well established. One example comes from one of the most told stories in the Western tradition. Although its meaning is the subject of some controversy, Jesus's conduct toward Judas may be read to express something like the statement, "I forgive you for what you are about to do."<sup>9</sup>

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<sup>9</sup> The passage in *John* seems to portray Jesus's treatment as forgiving, if not, encouraging Judas's betrayal. *Matthew* paints a somewhat darker picture: "He who has dipped his hand in the dish with me, will betray me. The Son of man goes as it is written of him, but woe be to that man by whom the Son of man is betrayed! It would have been better for that man if he had not been

But it should not be read as a grant of permission. Judas's action is still wrong. The idea that Jesus forgives Judas in advance for his betrayal shouldn't imply that he condoned it or that it was any less a betrayal. The forgiveness altered the sense in which Judas would be accountable for his sin, but it did not make the betrayal any less of a sin against Christ. Whether or not this is the correct biblical interpretation is unimportant. Insofar as this interpretation is intelligible, it illustrates a certain moral possibility. The story provides an example of preemptively waiving one's prerogative to hold another accountable without, at the same time, waiving one's entitlement to be treated justly.

One way to see that the waiver of complaint in these examples does not operate as a waiver of the duty is to consider the evaluation of a neutral observer. While the wounded soldier in the first example and Jesus in the second example may both have relinquished any complaint about the wrongfulness of the act done to them, this would not stop someone else from asserting that the acts were wrongful. Not only could we say that the acts are wrongful, but, more importantly, we could say that the acts were a violation of duties owed to the other person. Although wounded soldier may be barred from saying it, the rest of us can say that, in leaving him, the healthy soldier violates the duty he owed to him. And, regardless of whether Jesus preemptively forgave him, the rest of us can say that Judas betrayed Jesus—violated his duties to him. If this is correct, then waiving the complaint

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born." (26:23-24.) But the contrast between these two descriptions in some ways highlights the point that I want to make. It should be possible to say that Judas's betrayal was forgiven (as we get in *John*) even though it was very wrong (as we get in *Matthew*). This forgiving interpretation is reinforced by the famous plea: "Father, forgive them, for they know not what they do" (*Luke* 23:34.)

does not mean the elimination of the directed duty. The right—understood as the Hohfeldian correlate of that directed duty—survives the waiver of any potential complaint.

One thing that the two examples have in common is that they both seem to involve situations in which it would be hard to imagine the mere words making the action permissible. In the promise-to-stay example, it is hard to imagine what the wounded soldier could say that would truly release the other soldier from his obligation. This is because of various features of the example: the healthy soldier knew the situation when he made the promise, the promise is reinforced by background norms of soldiering, and the wounded soldier is now vulnerable. Similarly, in the Judas story, it seems hard to imagine that anyone can grant permission—can truly make it permissible—for another to be disloyal. Note that this brings back a similarity to the third-party cases. The mother could only waive a complaint regarding her daughter's injury because she couldn't waive a right.

While I don't think the impossibility of granting permission is necessary for preemptive forgiving to occur, I also don't think that it is coincidence that it appears in these examples. The sense that the rights in these examples are largely unwaivable operates to cancel the conversational implicature between waiving one's complaint and waiving one's right. While normally preemptively waiving any complaint would be understood to imply permission, that implication is blocked. For this reason, cases of unwaivable obligations are a natural context to see the separation that I am describing.



The same separation arises not only where a right cannot be waived on a particular occasion, but also where a right is inalienable.<sup>10</sup> Consider the following passage from Herbert Morris concerning inalienability:

It is only each person himself that can have his choices respected. It is no more possible to transfer this right than it is to transfer one's right to life. Nor can the right be waived. It cannot be waived because any agreement to being treated as an animal or an instrument does not provide others with the moral permission to so treat us. One can volunteer to be a shield, but then it is one's choice on a particular occasion to be a shield. If without our permission, without our choosing it, someone used us as a shield, we may, I should suppose, forgive the person for treating us as an object. But we do not thereby waive our right to be treated as a person, for that is a right that has been infringed and what we have at most done is put ourselves in a position where it is inappropriate any longer to exercise the right to complain. (1976, p.53)<sup>11</sup>

Morris's claim here is that there is an inalienable right to have one's choices respected. The inalienability is demonstrated by the fact that the most one can do is preemptively forgive, or, as he puts it, put ourselves in a position where we can no longer complain. Waiver of the right, Morris contends, is not truly possible. We can forgive the transgression, but we cannot waive the entitlement. "With respect to being treated as a person, one is 'disabled' from modifying relations of others to one" (Morris, 1976, p.54). What I am suggesting is that a similar sort of disability (even if not complete) helps explain why the utterances in the previous examples don't operate to imply a grant of permission. While preemptively waiving one's

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<sup>10</sup> The distinction between these ideas was mentioned in Chapter 3, but, for a discussion of the difference, see Feinberg (1978).

<sup>11</sup> Morris's use of the word "infringed" here is not meant in contrast with "violated" as recent philosophical usage would imply.

complaint will normally imply that one also waives one's claim-right, this implication will be blocked if the right is to some extent unwaivable.

Still, I don't believe that this unwaivability is a necessary feature of the sort of divergence that I have been describing, although it does provide the clearest examples. The implication can be blocked, I think, by explicit statement rather than by the circumstances. Consider an example. A guy promises his best friend, who is going through a tough divorce, that he will take him fishing on a particular weekend. As the weekend approaches, however, this guy receives an invitation to go to a concert from a woman that he has been romantically interested in for quite a while. It is rare opportunity to get closer with her, and he is very tempted. He goes to his friend and explains the situation, essentially requesting to be released from his promise. Now imagine the friend says something like this: "If you want me to let you off the hook, the answer is 'no.' You promised me, and you owe me this. But look, man, I can't make you go. If you decide to bail on me, I understand and I forgive you. I know you're really into this girl, and we've all been there. So I won't complain." What I want to claim is that there is nothing contradictory or incoherent in this statement. The friend refused to release the promise—i.e., waive his promissory right and grant permission—but he nonetheless forgives the prospective breaking of that promise—i.e., releases the future complaint he would otherwise have. Both these things must be explicitly stated because, otherwise, the one would naturally be taken to imply the opposite of the other. But this implication can be blocked by explicit disavowal, and it is here.

There is an element of this example that I want to highlight. The statement, “we’ve all been there,” helps make sense of the preemptive forgiving in the example. The statement helps the listener understand how the speaker can, on the one hand, insist on the existence of the duty and yet, on the other hand, forgive its transgression before it has even occurred—or, put another way, how he can retain his claim even while forsaking any future complaint. The forgiving is facilitated in part by the acknowledgement of shared imperfection in always living up to our obligations. In fact, this same idea is part of the Christian idea of forgiveness at work in the Judas example. One of the familiar Christian dogmas is the idea that we are all sinners. This idea can provide a certain basis for preemptive forgiving—or any forgiving for that matter. One relinquishes all complaint not because one views the other as unaccountable, but because one recognizes the same potential for failing in oneself. In Chapter 7, I discussed the way that wrongdoers can lose their standing to complain. What I am describing now is a way in which we can, in a sense, give up our standing to complain by voluntarily characterizing ourselves as wrongdoers. The ideas are not the same, by any stretch, but I can’t help but think that there is a connection.

Perhaps some self-deprecation—a recognition of one’s own sins or just a recognition of one’s own luck in not sinning—is at the root of all acts of forgiving,<sup>12</sup> but I’m not sure. I highlight such self-deprecation, though, because I think that it gives a glimpse into at least one way that one can release accountability and reactive attitudes without, at the same time, committing oneself to what Strawson (1962)

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<sup>12</sup> For some psychological evidence that it might be, see Exline et al. (2008).

called the objective attitude. The forgiver does not cease to view the other person as a normative agent. He doesn't give up the view that, in some sense, reactive attitudes would be appropriate. What he gives up, instead, is his own position to apply such reactive attitudes or engage in the practices of holding accountable. The waiver dissolves one way of morally relating to another without dissolving the moral relationship of owing and being owed moral obligations. If this is a possibility, it reveals the difference between these moral relations. It offers an example of directed duties coming apart from relationships of potential accountability and complaint.

There is a counterargument that I want to briefly touch upon. One might think that the sort of examples that I have described don't really involve waiving one's future complaint but rather promising not to complain. For the theorist who sees rights and accountability as going hand in hand, this will be an attractive response because it avoids having to admit that the person has no potential complaint and yet is still owed a duty. The person doesn't destroy his or her future complaint, but simply promises not to exercise it. When the violation occurs, the person still, in some sense, *has* the complaint.

There is not a great deal to say about this response because it is largely a stipulation. What I have been describing are cases in which one seems to have a right and yet at the same time one seems to have given up the moral entitlement to complain upon the right's violation. Having a complaint is understood in terms of being able, morally speaking, to do something—namely, to hold the other person accountable. The theorist attracted to the response described above simply posits

another, different sense of ‘having a complaint’ that has nothing to do with being able to do anything. ‘Having a complaint’ in this sense simply means having had a right violated. It is merely a placeholder to retain the desired equivalence. The response drives a wedge between having a complaint and any practical significance. The artificiality of the response is made clear by considering its implications in other situations. Is every waiver of a complaint like this? Is it impossible to forsake one’s moral complaint, and only possible to promise not to use it? And the same points might apply to waiving a right. Why not say that one never waives a right, but only promises not to exercise it?

These questions, I believe, highlight the fact that at least one important sense of having a right and having a complaint involves being able, normatively speaking, to do something. When we give up this normative ability, we have, in at least one sense, given up the complaint. One can, of course, insist on not using the terms in this way, but doing so will not change the moral phenomena. My argument is that, in at least one important sense of the idea, one can preemptively waive a future complaint, and this waiver need not imply that one has waived one’s correlative right, in the relevant sense.

### 9.3 WAIVING A RIGHT WITHOUT WAIVING A COMPLAINT

IN THE PREVIOUS SECTION, I ARGUED that one can waive a future complaint without waiving a right. This possibility suggests that having a right involves something distinct from being potentially able to hold another accountable. But what about the other way around? Can one waive a right without waiving the future com-

plaint?

Superficially, the answer may appear to be 'no.' If one waives one's right, then there would seem to be no basis on which to lodge a complaint. One cannot grant permission and then complain when the permission is exercised.<sup>13</sup> This leads Joel Feinberg, for example, to write, "One class of harms ... must certainly be excluded from those that are properly called wrongs, namely those to which the victim has consented" (1984, p.35). If this is correct, then it will reintroduce some idea that waiving a right and a complaint necessarily go hand in hand. Even if we can forgive without granting permission, the thought goes, we cannot grant permission without waiving a future complaint. I want to suggest, however, that the divergence actually is bidirectional. That is, I want to suggest that it is possible to waive one's right and yet not waive one's future complaint.

Based on Feinberg's idea, this suggestion may appear immediately implausible. The implausibility might be expressed in the following way: if one has waived one's right, then cannot complain about the violation of the right because, insofar as the right was waived, there could not have been a violation of it. I think this line of thought, though logically valid, is misguided. What is important is not whether one can complain about the violation of a right, but rather whether one can complain against the action taken. If I waive my right that you do  $\phi$ , then it is necessarily true that you will not violate my right by not doing  $\phi$ . So I cannot complain that you had violated my right. But what is not tautological is whether I can complain about your not doing  $\phi$ .

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<sup>13</sup> Not, at least, if one genuinely means it. There may be social contexts in which we express a grant of permission that is not truly meant and not intended to be taken as such.

The relevant comparison is between a right and a complaint with the same object, namely the action  $\varphi$ . Put more precisely, the two relevant types of propositions are (1) 'X has a right that Y do  $\varphi$ ,' and (2) 'X has a complaint against Y for failing to do  $\varphi$ .' Waiving a right is a way of making a proposition of type (1) no longer true. When X waives his right that Y do  $\varphi$ , it is no longer the case that X has a right that Y do  $\varphi$ . What I mean to argue is that such a waiver does not necessarily negate a proposition of type (2). Put another way, a proposition of form (2) can truthfully coexist with a proposition of form (3) 'X has waived his/her right that Y do  $\varphi$ .'

This occurs, I believe, when someone acts wrongly toward another person, but where the wrongness is not attributable to violating a right, because any right has been waived or disavowed. This circumstance can arise, I think, in a number of ways. I will describe three.

First, consider a literary example. In *War and Peace*, Prince Andrei Bolkonski, a wealthy, thirty-one-year-old widower, and Natasha Rostova, a vivacious 16-year-old girl who has just come out in society, fall in love with one another. Prince Andrei proposes to Natasha, and she joyfully accepts. But Prince Andrei's father disapproves of his son remarrying, and it is agreed that the marriage will be delayed for a full year. Prince Andrei says to his young lover, "[I]t will give you time to be sure of yourself. I ask you to make me happy in a year, but you are free: our engagement shall remain a secret, and should you find that you do not love me, or should you come to love..." (1937, Bk.6, Ch.xxiii). At this point, Natasha cuts him off, but Tolstoy informs the reader:

No betrothal ceremony took place and Natasha's engagement to Bolkonski was not announced; Prince Andrei insisted on that. He said that as he was responsible for the delay he ought to bear the whole burden of it; that he had given his word and bound himself forever, but that he did not wish to bind Natasha and gave her perfect freedom. If after six months she felt that she did not love him she would have full right to reject him. Naturally neither Natasha nor her parents wished to hear of this, but Prince Andrei was firm.  
(1937, Bk.6,Ch.xxiv)

Several months later, having been apart from one another, Natasha nearly elopes with an unworthy adventurer and, in the midst of her irresponsible passion, calls off her engagement with Prince Andrei.

Although Prince Andrei explicitly and firmly granted Natasha permission to do just this, there is little doubt that she nevertheless wrongs the Prince. She feels it this way, declaring, "I know all is over... I'm only tormented by the wrong I have done him. Tell him only that I beg him to forgive... me for everything..." (1937, Bk.8,Ch.xxii).<sup>14</sup> For his part, Prince Andrei at one point thinks to himself, "[H]ow many people have I hated in my life? And of them all, I loved and hated none as I did her." And he says to a friend, "I said that a fallen woman should be forgiven, but I didn't say I could forgive her. I can't." (1937, Bk.8, Ch.xxi). It is a crucial part of the story that Natasha and Prince Andrei are, from that point forward, united as one who is wronged and one who has been wronged.

Natasha wrongs Prince Andrei, it seems, by doing precisely what Prince Andrei granted her permission to do. One might argue that this only shows that we should

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<sup>14</sup> Tolstoy describes to the reader how, in the months that followed, "she remembered Prince Andrei, prayed for him, and asked God to forgive her all the wrongs she had done him" (Bk.9, Ch.xviii). She also wonders to a friend, "Will he ever forgive me? Will he not always have a bitter feeling toward me?" (Bk. 9, Ch.xx).



not take Prince Andrei's grant of permission seriously—that it should be considered an empty politeness. But I think that it would be a mistake to say this. Prince Andrei firmly gave up his claim to an engagement. Natasha was not promised to him, and she does not act wrongly because she violates Prince Andrei's rights. Rather, she acts wrongly because she throws away their love in a disreputable and foolish moment of weakness and youth. He has a complaint because she has acted wrongly regarding him, even though he has waived any rights that he might have had.<sup>15</sup>

To draw out the point, one can imagine that a situation in which the rights that are waived and the acting wrongly are more clearly disconnected. Suppose that your family farm was sold several years ago to a local organic farmer. Your family wanted to retain a right that the land not be developed, however. As a result, you and your siblings were each individually granted options to repurchase the farm if the land were ever to be developed. As the oldest sibling, you have the first option. One day, the farmer explains that he's looking to sell because the land is more valuable as a cookie-cutter subdivision than as organic sunflowers. He wants to know if you will exercise your option to buy. You desperately don't want to see the land your family worked for generations turned into suburbia. But you know that your younger sister will buy the farm—she has expressed her intention to do so if the situation ever arose—and it is better suited for her—she has the resources and the green thumb to make it work. So you decline. That is, you waive your right to

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<sup>15</sup> As will be discussed in Chapter 10, it is not the fact that she acted wrongly per se that is important, but the fact that she cannot justify herself to Prince Andrei. In most cases, like this one, these two ideas converge.

repurchase and thereby prevent the development. Now imagine that the farmer bypasses your sister and sells the farm to a developer. That is, he blatantly violates your sister's option rights.

My sense is that you will feel aggrieved by the destruction of your family's farm. This is the case, I would suggest, even though you waived *your* right to ensure that the farm was preserved. In other words, you have a complaint against the development even though you waived your right that the development not take place. If this characterization is correct, then waiving one's right to  $\varphi$  does not mean that one waives one's complaint if  $\varphi$  is not done. More explicitly, "you waived your right that the farmer not subdivide the farm" is true and so is "you have a complaint against the farmer for subdividing the farm."

Now this example is admittedly laden with complicating factors. First, the example obviously trades on the same third-party relationship discussed previously in Chapter 4. You are aggrieved even though your right hasn't been violated because your sister's right has been violated. But, in my view, this is not essential. Your sister's right is significant in that it is the source of the obligation that the farmer violates. But something else could play this role. Suppose, for example, that there had been implemented strict zoning and/or historic preservation laws such that you knew that the family farm could not be demolished and the land subdivided. If you had turned the option down believing your interests would be protected on this basis, only to find the laws flouted, I think that too would be the basis for a sense of injury. What is important is that there be something else—aside from the waived right—that makes the act of developing the farm impermis-

sible.

This last point might make the example seem disappointing. One might object that the waived right seems to be entirely superfluous. The example was offered to show that one could waive a right and yet not waive the corresponding complaint. But it may seem like the example is simply a case in which there is a waived right and an entirely separate complaint. The complaint is not connected to the right.

But this is, in some sense, the point: the complaint that the farmer sold the farm to a developer isn't necessarily connected to your right that the farmer not sell the farm to a developer. What explains the wrongness of the farmer's action isn't your right. Still, the complaint and the right are connected in the sense that they have the same subject. The subject of the complaint, like the subject of the right, is an action—here, the act of selling to a developer. You had a right (albeit conditional) that this not be done, and you have a complaint that it was done. The subject of the complaint is the thing that you had a right against, but the complaint is not based on the violation of a right. In this way, there can be a waiver of the right to  $\varphi$  without necessarily surrendering one's potential complaint against  $\varphi$  being done.

Furthermore, it is not true that, in this example, the complaint is wholly disconnected from the waiver. Part of your ground for feeling aggrieved is the sense that you would not have waived your right if you had known what the farmer would do. You relied on an expectation that the farmer would abide by his obligations. Even though he made no particular representations to you, you will feel misled or exploited. Part of the complaint, therefore, does depend on the waiver and the sense that it was unfairly garnered. Your complaint isn't based on the violation of

your right, but your right is part of what gives you standing to complain about the violation of other norms.

This description naturally leads into a third example—or class of examples—in which I believe that one waives a right and yet still might hold a complaint in the future. I believe that cases of consensual, mutually advantageous exploitation are properly described in this way.<sup>16</sup> “Exploitation” can refer to a wide variety of interactions. What I want to focus on, though, are cases in which a person willingly consents to an exchange with another person and that exchange is, in fact, mutually beneficial, but we would nevertheless say that one party is “exploiting” or “taking advantage of” the other person. There are many classic examples that might, under proper circumstances, fit this description—a sweatshop laborer, a sex worker, an organ seller, a surrogate mother, etc. The exploited party may knowingly consent to the exchange, and they may do so out of a reasonable belief that they will be better off by doing so. Of course, in many actual cases, there may be no genuine waiver as the person may have been coerced or deceived, but that goes beyond the sort of exploitation on which I want to focus.

My claim is that, in cases of mutually advantageous exploitation, the exploited party waives his or her rights against some treatment, and yet that person is nevertheless wronged by the treatment. For example, a sweatshop laborer consents to work in oppressive conditions and yet she has a complaint against working in such conditions.<sup>17</sup> A surrogate mother waives her parental rights with regard to her

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<sup>16</sup> A helpful survey of the various ways that “exploitation” is used and for the distinction between “harmful exploitation” and “mutually advantageous exploitation,” see Wertheimer (1999, Ch.1).

<sup>17</sup> For an extended argument to this effect, see Meyers (2004).

child and yet she may be wronged by having her child taken from her. In short, the exploited party genuinely waives his or her rights—usually driven to do so by poverty—and nevertheless we think that the exploited party is wronged *by his or her exploiter*. This last bit is important. An impoverished individual may be wronged by the social system that put him or her in that position, but an exploited individual is uniquely wronged by the exploiter. In fact, the idea of exploitation can seem to imply the idea of wrongdoing. As one writer puts it, “to exploit people is to wrong them, however much or little they may lose or you may gain from the act” (Goodin, 1987, p.182). For many rights theorists, this creates a puzzle: how can someone consent and yet still be wronged?

A typical response is to deny one side of the paradox or the other: either the poverty is so powerful that it counts as coercion and there was no genuine waiver or, alternatively, the exploiter does not actually wrong the exploited party.<sup>18</sup> But neither of these options, nor some combination of them, strikes me as a plausible strategy for explaining every circumstance. There will be some individuals who will think something like, “I know that I signed up to be treated this way, and I know that I could quit if I wanted, but I still feel aggrieved and resentful at being treated this way.” I think that our moral theory shouldn’t demand that we say that

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<sup>18</sup> There are actually two possible routes within this position. Some writers, especially from the business or economic community, view the consent of the exploited parties as meaning that the exploitation is permissible. See, e.g., Maitland (2003); Zwolinski (2007). On the other hand, it is possible to believe that exploitation is wrong, but not a wrong to the exploited party. Joel Feinberg, for example, writes, “In these cases there is no wrongful loss for the exploitee, who can himself have no grievance” (1988, p.176). Feinberg sees the mutually advantageous exploitation as a “free-floating evil.” My own view shares a certain similarity with Feinberg’s in that I see the wrongfulness of exploitation as free-floating, but, because I do not believe that a grievance must be predicated on a rights-violation, I do believe that the exploited party has a grievance.

this combination of thoughts is inherently mistaken. In such a case, we should have the option of saying that the exploited person did waive his or her right against such treatment and yet retains some complaint against that treatment.

To make this point, it may be worth focusing for a moment on a single form of exploitation. In 2007, *The Guardian* interviewed a sex worker in a London suburb.<sup>19</sup> The woman interviewed was not the victim of human trafficking or drug addiction, but a fifty-something former administrator. What is striking about the interview is that, despite viewing it as her own choice, the woman clearly views her trade as exploitative. In fact, her words could hardly be stronger in condemning the sex industry as exploiting women: “I believe there is a conspiracy to turn women into readily accessible semen receptacles. Men are twisting this now to make women think it’s a level playing field and it’s equal and liberating. No, it suits men, it’s convenient for men. That’s what is so insidious.” Describing her work itself, she says, “Some people say that prostitution is actually a man paying to rape a woman. I think that is true in a lot of cases. Although it is a business arrangement, he is getting off on the fact that the woman doesn’t want it. Basically you’ve consented to being raped for money.” Later in the article, she adds, “Sometimes I think, it’s just a performance. But it’s not, it’s more than that and it’s very harmful.” As these quotations illustrate, her resentment toward her male clientele plainly comes through. And, I think, her feelings and complaints are reasonable.

But it is hard to view the woman in the article as not freely choosing her trade. The easier story would be to assume that she “had no choice” or “didn’t know what

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<sup>19</sup> Ermine Saner, “You’re consenting to being raped for money,” *The Guardian*, Dec. 10, 2007.

she was getting into” and that her exploitation was the result of duress or deception. But this easy story does not necessarily fit. She explains her initial choice by saying, “I started going on blind dates and it slowly started to evolve into having sex with strangers ... I had a bad month, financially, as I invariably would, and it started as a trickle. I had always been curious about doing it—I think I was trying to prove to myself that actually prostitution was OK.” Financial need is a factor, but her employment hardly comes across as an act of desperation. I would venture to call it a paternalistic fiction that all exploited sex workers are necessarily not making a free choice. As one scholar wrote after spending time with Caribbean sex workers, “I have been particularly alarmed at the media’s monolithic portrayal of sex workers in sex-tourist destinations, such as Cuba, as passive victims easily lured by the glitter of consumer goods. These overly simplistic and implicitly moralizing stories deny that poor women are capable of making their own labor choices” (Brennan, 2002, p.155). That sex workers are often exploited and, in at least some sense, wronged by the men who purchase their services should not lead us to reject automatically that their choices might be freely made.

The alternative, I am claiming, is to accept both descriptions. A sex worker may be exploited and thereby wronged by her exploiter, and yet at the same time have consented and thereby waived her right not to be treated in this fashion. The waiver of the right does not, in these cases, equate with having forfeited all ground for complaint.

One response to this argument is to suggest that there is a right not to be exploited. By positing this right, in addition to the underlying right against bad treat-

ment, one can make sense of the divergence that I have been describing: the exploited party waives the latter but not the former. According to this line of thought, for example, the sweatshop worker waives his right not to be made to work eighteen hours per day, but he nevertheless has a complaint, founded upon his right not be exploited, which is violated by his exploiter.

Even if there is such a right, I do not think that the complaint of the exploited party is neatly circumscribed by the violation of that right. It would be artificial, I think, to say that the sweatshop worker can complain about being exploited but cannot complain about his employer demanding eighteen hours per day of work. From the perspective of the complaint, they are one and the same. The treatment—that is, the act of the other person—is the source of injury and resentment.<sup>20</sup>

Recall that my claim is that a statement of form (2)—‘X has a complaint against Y for failing to do  $\varphi$ ’—can truthfully coexist with a statement of the form (3)—‘X has waived the right that Y do  $\varphi$ ’. This way of putting the issue makes evident how an appeal to a right not to be exploited is unhelpful. My claim is that, when  $\varphi$  represents something like demanding only reasonable amounts of work in humane conditions, statements of these two forms may simultaneously be true. Appealing to a right not to be exploited does not alter this analysis. It simply substitutes a different content for  $\varphi$ . To address my claim, what would be required is an argument that one of the statements I am suggesting to be true is in fact false. Positing

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<sup>20</sup> Analogously, in the family farm example, your complaint is against the development of the farm generally. It is not limited to the discrete idea that you were taken advantage of. In fact, such a segregation seems hard to conceptualize.



a right not to be exploited doesn't accomplish this.<sup>21</sup>

This may seem like a technical point, but it reflects an important and intuitive idea: the subject of a complaint is an action of another person. It is the action—the treatment—that is the target of an exploited party's complaint. Insofar as this is correct, there will be a gap between waiving a right to some action and being unable to complain about such action.

#### 9.4 WAIVER'S LIMITATIONS

It is no coincidence that the concept of exploitation figures significantly in the same Marxist tradition that expresses a general skepticism towards rights, particularly rights in the model of the will theory. If one takes exploitation seriously, then a moral theory that makes choice and consent the touchstone of moral permissibility will appear unsatisfactory. And a framework that allocates moral authority as a sort of property may seem to lead naturally to a society of exploitation, setting citizens against each other as they seek to 'acquire' more power by extracting it from others.

I believe that properly distinguishing rights and complaints can alleviate some of these fears. In the first half of this chapter, I argued that one could waive a future

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<sup>21</sup> The idea would have to be that the right not to be exploited grounds a complaint, and that this makes it acceptable to say that the complaint I am describing doesn't exist. Since we can say that the exploited party has a complaint, it is okay that we cannot say she has a complaint against the particular action being done to her. This makes sense if all we care about is saying that the exploited party has some complaint, i.e., that (2) is true for some  $\varphi$ . If this is all we care about, then we can accomplish with the following: if  $\varphi$  is refusing to exploit, then (2) is true and (3) is false, but, if  $\varphi$  is demanding inhumane labor, then (3) is true but (2) is false. But my argument is that this isn't all that we care about. The exploited party has a complaint against the action itself—not just against the action under the description "exploitation."

complaint without waiving the corresponding right. In the second half, I made the opposite claim—that one can waive a right without surrendering one’s complaint concerning the same subject matter. What these arguments share is the idea that waiver may transform the moral landscape less than one might think.

Waiver is sometimes described a sort of magical power to transform a person’s moral relationship with another person. But, in this chapter, I have tried to emphasize the fact that, for all that waiver may transform, it may also leave a great deal intact. Waiving a right or a complaint does not mean that important moral relationships do not persist. This is, in part, because there are important moral obligations that resist waiver—whether it is loyalty towards a comrade or not objectifying another human being.

If this is right, then waiver will often have a limited scope. I believe that this insight presses in favor of separating rights and complaints. We can accommodate the diversity of actual cases only by viewing the waiver as operating on one or the other—rights or complaints—but not both. This is, I believe, an important argument in favor of viewing rights and complaints as distinct moral phenomena.

*I've studied all the lore of separation  
From grievances bare-headed in the night.*

Osip Mandelstam

# 10

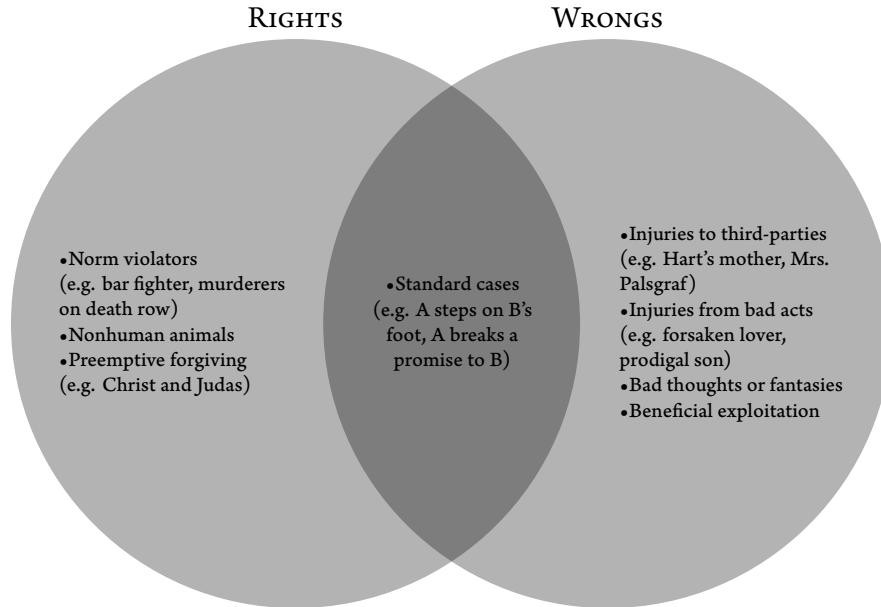
## Two Kinds of Relations

I HAVE ARGUED THAT WE SHOULD ABANDON the assumption that rights and wrongs are different forms of the same moral relation. Thus far, my arguments have been largely based on the thought that such an assumption is incompatible with our everyday understandings and practices with regard to these relations. The arguments have been presented as a matter of casting aside a tempting theoretical assumption

for the sake of accuracy to our moral practices. To the extent that the reader has accepted these arguments, she may have done so only as a bitter pill that must unfortunately be swallowed. In this chapter, I want to try to alleviate this bitterness. I believe that the division between rights and wrongs is connected with a natural division between two different ways that people morally relate to one another. Thus, separating rights and wrongs may be viewed not as a theoretical misfortune but as a happy way to capture two otherwise competing thoughts about morality.

At the same time, this chapter also aims to give a more systematic account of the nature of rights and wronging. In Chapters 4 through 9, I presented a variety of reasons for thinking that rights and wrongings are, in fact, distinct moral phenomena. Methodologically, my argument relied on showing divergences in where we find the two phenomena and in how they figure in our moral lives. We have settled commitments about wrongs—commitments about the appropriateness of complaint, resentment, apology, forgiveness, compensation, and so on. And we also have settled commitments about rights—commitments about claiming, waiving, trumping, action-guiding, and so on. I have argued that these two sets of commitments reveal patterned differences between wronging and rights.

Some of the differences concern our intuitions about particular cases; they suggest that rights and wrongs are not coextensive. For example, I think that our everyday moral judgments and practices suggest that a parent may be wronged by an injury to his or her child. The following venn diagram roughly summarizes the types of cases where I have argued that rights and wrongings to not overlap:



**Figure 10.1:** Different extensions

But the arguments are not based only on a lack of coextension uncovered through intuition-pumping. Some of our commitments concern the role that these relationships play and how they are experienced. For example, the reason not to posit that the parent has a right not to have his or her child injured is that we want to reserve the idea of a right for a particular role—one involving guiding action and being claimed or waived. In the course of the previous six chapters, a number of such qualitative difference have emerged. Some of these differences are summarized in Table 10.1.

Of course, this is just a very crude summary. The point is that, in addition to demonstrating how these moral relationships can exist without one another, I have tried to show that, qualitatively, rights and wrongs have different functions and

RIGHTS	WRONGS
<ul style="list-style-type: none"> <li>• action guiding</li> <li>• ex ante entitlements</li> <li>• require authority to demand</li> <li>• bimodal</li> </ul>	<ul style="list-style-type: none"> <li>• not directly action guiding</li> <li>• depend on consequences</li> <li>• depend on the wronged party</li> <li>• come in degrees</li> </ul>

**Table 10.1:** Qualitative differences

character.

Between the extensional and qualitative differences, the preceding chapters have indirectly catalogued a variety of facts about rights and wronging. My hope now is to draw upon this catalogue to say something directly about what these moral relationships involve.

### 10.1 THREE PAIRS OF PERSPECTIVES

THE TENDENCY TO ALIGN RIGHTS AND WRONGS arises out of the sense that both are expressions of the way that morality can connect one party with another—expressions of the way that our conduct may be owed to others and something for which we are accountable to others. I believe that this thought is half correct: rights and wrongs do represent moral connections between persons. The mistake lies in thinking that our moral connections are ultimately all of a single sort.

I think that differences between rights and wrongs that emerge from the previous chapters parallel some deep tensions in how we think about moral relationships. This parallel, I mean to argue, makes separate analysis of rights and wrongings seem quite natural, even felicitous. Rights and wrongings come apart, I will argue, because they involve other things that also come apart.

I begin by describing—or, in some instances, returning to—three different tensions in the ways that we think about rights, directed duties, and moral relations generally. These tensions can seem irreconcilable, and I mean to embrace that. My claim is that, without giving up on the commitments that seem to be in tension, the tensions can nevertheless be alleviated by distinguishing rights from wrongings. In this way, I hope to show that the division that I have been urging, which may have initially seemed unpalatable, is actually a way to preserve seemingly incompatible ideas about rights and interpersonal morality.

#### 10.1.1 THEORIES OF RIGHTS

In Chapters 2 and 3, I described two approaches to thinking about rights. I suggested that each view had appealing aspects, but that neither of them seemed to capture everything that we want to say about rights and wrongdoing. The interest theory, I argued, seems to have something correct in attending to the ideas of harm and justification. But it is prone to giving rights to third-party stakeholders, and it struggles to capture how a right involves a duty owed to the rightholder and how having a right is tied to being able to perform certain activities. The will theory, in contrast, features the very ideas that the interest theory lacks. It explains the way that a duty is owed to another by attending to the rightholder's ability to exercise normative control. But, although this approach captures the sense that many rights are about ownership of normative control, it loses touch with the idea that rights guard against some of our deepest injuries. By transforming all violations into trespasses on each person's individual sphere of sovereign control, the will

theory restricts the type of complaints that we can make against one another.

There is an observable pattern here: the strengths and weaknesses of each view on rights seem to mirror one another.<sup>1</sup> The interest theory produces too many rights claims, and the will theory produces too few wrongs. The interest theory focuses on the ideas of harm and justification, and it struggles to describe the directedness of duties and the powers involved in rightholding. The will theory focuses on explaining the directness of certain duties in terms of the recipient's powers to engage in certain normative activities, but it struggles to cover the diversity of injuries for which we can demand justification, bogged down by focusing only on individual self-sovereignty.

I believe that one can capture the insights of each of these theories by divorcing the concepts of rights and wrongs—the activities of claiming and complaining. If one denies that rights and wrongings are flipsides of the same coin, then the interest and will theories can be interpreted as attending to different concepts, rather than essentially in disagreement. The interest theory's focus on harms and justification are at the core of what it is to be wronged, which is natural given the primacy that the interest theory gives to injuries and wrongings. Conversely, the will theory's focus on directed duties and normative control provides a more compelling conception of a right if one does not view this as constraining the complaints we can make against one another—if one has the resources to acknowledge the stake

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<sup>1</sup> Lief Wenar observes this mirroring: "The will and the interest theory are both inadequate to our understanding of rights, the weakness of each being the strength of the other" (2005, p.243). I think that Wenar is right to see the interest and choice theories as essentially mirror-images of each other and as focused on different concepts so as to be somewhat orthogonal to each other. So I think the spirit of his diagnosis is a good one, but I do not find his positive account explanatorily illuminating.



that we have in each other's lives beyond those things to which we are entitled. Put very simply: the interest theory roughly captures wrongdoing, and the will theory roughly captures rights.

#### 10.1.2 RESPECT AND JUSTIFICATION

I believe that the distinction between rights and wrongings maps onto a more fundamental distinction in our ways of relating to each other morally. Moral philosophers often appeal to two different ideas in describing our essential moral relationships: respect and justification. For some, morality is ultimately about respecting persons' moral significance; for others, morality is about ensuring that our actions are justifiable to one another. Of course, philosophers generally don't reject either idea, but they do tend to privilege one or the other. Respect can be the crucial idea, with acting justifiably being simply a component or byproduct of treating others with respect. Or justification may be what gives content to the otherwise indeterminate catchword of respect. So, while few would reject the significance of respect or justification, one or the other is taken to be explanatorily primary. In this way, the assumption that a single form must undergird all moral relationships drives a tension between these two ideas.

In thinking about rights and directed duties, philosophers regularly say that the directedness of these concepts has to do with the way the rights and duties constitute respect for the other person. This thought has a natural appeal. The fact that I owe various obligations to you seems to reflect the fact that I should recognize you as morally significant. I must attend to your moral status; I must see you as having

a sort of authority with regard to me. To have rights seems, in this way, to involve being an object of proper respect from others.

This connection between rights and respect has an obvious Kantian heritage. The idea is that rights are the proper respect for the status that all of us have as members of humanity. In Kant's words,

[A] human being regarded as a *person*, that is, as the subject of a morally practical reason, is exalted above any price; for as a person he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses *dignity* (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them. Humanity in his person is the object of the respect which he can demand from every other human being... (1965, 6:434-35)

More modern rights theorists have picked up on this same line of thought. Warren Quinn, for example, similarly appeals to the idea that rights are entailed by the proper respect for persons:

A person is constituted by his body and his mind. They are parts or aspects of him. For that very reason, it is fitting that he have primary say over what may be done to them—not because such an arrangement best promotes overall human welfare, but because any arrangement that denied him that say would be a grave indignity. In giving him this authority, morality recognizes his existence as an individual with ends of his own—an independent being. Since that is what he is, he deserves this recognition... It is not that we think it fitting to ascribe rights because we think it is a good thing that rights be respected. Rather we think respect for rights a good thing precisely because we think people actually have them—and... that they have them because it is fitting that they should. (1993, pp.170,173)

Robert Nozick appeals to the respect for the moral status of persons as a way to explain the non-aggregative feature of right. He writes:

Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent ... Side constraints express the inviolability of other persons. But why may not one violate persons for the greater social good? ... To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has. (1974, pp. 30-33)

Picking up on this same line of thought, Frances Kamm writes:

[W]e might say that some rights are a response to the good (worth, importance, dignity) of the person and/or his sovereignty over himself, rather than a response to what is good *for* the person (what is in his interest). If it is in a person's interest to be a being of such importance, the right is still not a response to his interest in being important, but simply to his importance. (The interest gets protected as a side-effect, not as the point, of the right.) The strength of the right is not a mark of the strength of the interest it protects, but a mark of the fact that the right is a response to a characteristic of persons that makes persons important. (2002, p.487)

And Joel Feinberg argues that having rights may simply amount to the ability to demand respect from others:

Having rights enables us to "stand up like men," to look others in the eye, and to feel in some fundamental way equal to anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal self-respect that is necessary to be worthy of the love and esteem of others. Indeed, respect for persons (this is an intriguing idea) may simply be respect for their rights, so

that there cannot be the one without the other; and what is called “human dignity” may simply be the recognizable capacity to assert claims. (1970, p.252)

I have included these lengthy quotations to illustrate a common theme. Rights exist where others are under a duty *out of respect for* the rightholder. In particular, rights involve the proper response to a morally significant *status* that the other person possesses. Below, I will return to this line of thought: that having rights means that others are under a duty based on respect for a status that the rightholder possesses.

There is, however, another theme that philosophers often emphasize in thinking about rights and directed duties. This is the thought that actions should be justifiable to those upon whom they bear. Having a right, on this view, involves the fact that others are accountable *to you*. For example, Thomas Nagel offers the following sketch of why there might be absolutist constraints on action—that is, why utilitarian reasoning may have to give way to rights-based reasoning:

[Utilitarian justifications] are really justifications to the world at large, which the victim, as a reasonable man, would be expected to appreciate. However, there seems to me something wrong with this view, for it ignores the possibility that to treat someone else horribly puts you in a special relation to him, which may have to be defended in terms of other features of your relation to him. The suggestion needs much more development; but it may help us to understand how there may be requirements which are absolute in the sense that there can be no justification for violating them. If the justification for what one did to another person had to be such that it could be offered to him specifically, rather than just to the world at large, that would be a significant source of restraint. (1972, p.137)

This sort of focus on justifiability to has famously become the foundation for modern contractualist ethics. Scanlon, for example, says that he “takes the idea of justifiability to be basic in two ways: this idea provides both the normative basis of the morality of right and wrong and the most general characterization of its content” (1998, p.189). In other words, morality is essentially about acting so that our actions are justifiable to others.

This picture connects with the thought that morality concerns accountability to those who are affected by our actions. On this note, Jay Wallace writes:

What makes an action of mine morally wrong is the fact that it cannot be justified to someone affected by it on terms that person would be unreasonable to reject. In a situation in which I do something morally wrong, the person adversely affected will have been wronged by me, and have privileged basis for moral complaint, resentment, and so on, precisely insofar as I have acted with indifference to the value of relating to them on a basis of mutual recognition and regard. (2013, p.163)

In this way, justifiability, like respect, purports to explain the directedness of our moral obligations. Whereas respect focuses on the sense in which moral agents should recognize other persons as having an authoritative status, justification focuses on the way in which agents are accountable to other persons who are affected by our actions. Both concepts highlight a different way in which other persons matter to our actions and, conversely, different ways in which we relate to other people’s actions. These two ways of relating to each other—as demanding one another’s respect and as accountable to one another—constitute two ways that philosophers describe the relationship between moral agents. In particular, these

relations are used to describe morality's "deontic" or "bipolar" or "directed" structure.

What I want to suggest is that these two descriptions actually pick out two different moral relationships. Furthermore, I want to suggest that the difference between respect and justification parallels the distinction between rights and wrongs. Thinking of rights and wrongs as distinguishable phenomena makes it possible to capture both of these fundamental moral concepts independently. Rights are based on the respect that we owe to one another. Wrongs, on the other hand, relate to the sense that we should be able to justify our actions to each other. This is not to deny that there is considerable overlap, both between respect and justification and between rights and wrongs. But, respect and justification seem to involve distinguishable and sometimes competing ideas. I think that the distinction between them can be seen as mapping onto the distinction between rights and wrongs.

Notice how this suggestion dovetails with the earlier points about the interest theory and the will theory. Respect and justification seem to animate the difference between the interest theory and the will theory. The interest theory begins from a focus on unjustifiable harms to our interests. To have a right is to have one's interests protected from harm by a set of norms. The will theory, in contrast, begins with the idea that a right-holder has a special kind of normative influence. To have a right is to have one's choices command respect.

### 10.1.3 EX ANTE AND EX POST

Interpersonal morality involves both forward-looking and backward-looking perspectives. Before an action is undertaken, two agents can be related as one who owes a duty and one to whom the duty is owed. After an action is performed, the perspective is different. Agents may be related as one who did something and one to whom something was done. Even if one doubts that this difference is morally important, it undeniably arises simply from the temporal structure of actions.

Furthermore, the ex ante and ex post relationships involve different moral structures and practices. Before an action is undertaken, a person may owe it to another person to act in a particular way. In such contexts, the person to whom the action is owed has a sort of moral entitlement, which is frequently illustrated by that person's ability to claim, waive, control, or even transfer the duty in question. After an action has been performed (or omitted), a person may be in a position to hold another accountable for a failure. The victim might resent the transgressor, complain about the injury, demand compensation, or seek to forgive the trespass; the transgressor might apologize, offer restitution, or simply feel the stinging guilt of having committed an injustice.

This distinction connects, I believe, with the contrast between justification and respect. One way in which the ideas of justification and respect are distinguished is by the perspectives that they represent. Justification largely occurs in a backward-looking context. The practices of giving or demanding justification most naturally take place against a backdrop of an action that has already been performed. They paradigmatically have forms like "Why did you do that?" and "*x*, *y*, and *z* rea-

sons supported my doing that.” It is true that there are some partial exceptions. In a forward-looking manner, we can inquire whether an action *would be* justifiable. But even this question involves assuming something of a hypothetical *ex post* perspective. Roughly speaking, it asks what could be said, if the action were performed, to those affected. We also sometimes give justification for an action that has yet to be done, as when a coach explains to an athlete why he is going to be cut from the squad the next day. But this practice too is largely retrospective in that it presupposes that the thing to be done is a *fait accompli*.<sup>2</sup> So, although I don’t want to deny that justification can occur in a range of contexts, I think that it typically involves some form of a backward-looking perspective.

Respect, in contrast, is basically forward-looking. Respecting someone’s status as a person involves giving that person a proper place in one’s considerations. It involves giving another person weight. Respect captures the relationship in which an agent is guided by another person’s moral significance going forward. We can, of course, evaluate after the fact whether an action manifested proper respect for another person. But I think that this is essentially a retrospective evaluation of the agent’s forward-looking deliberations—his or her *approach*. Actually giving another person respect is something that is done going forward.

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<sup>2</sup> We can even give justification for something that might or might not happen, as when the coach explains to an athlete that he will be cut the next day if the team sponsorship doesn’t come through. But even this has the same backward-looking structure. It assumes that the chips are down and all that is left is to see how the cards fall. My point is that one does not generally give or demand justification when a choice has yet to be made—when the decision is still up in the air. Before making a choice, we can think about what justifications we could offer if we chose one way or another, but this is basically a matter of thinking about what would follow after the choice. In this sense, giving or demanding justification always has something of an after-the-fact perspective.



As I said, there is undeniably a temporal difference between the ex ante and ex post relationships. But I believe that the difference between ex ante and ex post relationships represents more than simply different temporal perspectives on the same relationship. Through a variety of arguments, I have tried to show that the structures and practices involved in ex ante and ex post moral relationships come apart in certain ways. How we relate morally to one another ex ante and ex post are, I believe, quite different. For this reason, rights and wrongs do not always come as a unified package. At a broad, structural level, one might say that this is because ex ante we relate to each other in terms of giving and demanding respect and ex post we relate to each other by giving and demanding justifications.

## 10.2 WRONGING

MY THESIS IS THAT RIGHTS AND WRONGING are best understood when they are decoupled from each other. I have offered a number of arguments for this separation, but, thus far, I have not attempted to give an actual analysis of these two concepts. I have argued only that, by linking the two concepts for theoretical simplicity, we may obscure the actual relationships that the concepts describe. But what are these relationships? When has one person wronged another person?

The philosopher who is asked to imagine a wrong is likely to conjure up an example of deliberate rights violation. One might envisage physical violence—punching, murder, and so on. Or one might imagine denying someone something that is rightfully hers—stealing or destroying property, breaking a promise, and so on. All of these examples no doubt typically constitute wrongs. But I want to

resist the idea that these examples are paradigmatic.

In the preceding chapters, there have been many examples that do not have this simple complexion of a rights violation leading to an injury. Ripstein's homeowner is wronged by the harmless trespasser. The mother is wronged by the negligent driver who kills her daughter. The coworker is wronged when one indulges in violent sexual fantasies about her. Cass Mastern wrongs the slave girl who is the unwitting victim of his illicit affair. Walter O'Malley wrongs the Brooklyn Dodgers fans. The prostitute is wronged by those who exploit her, even though she has consented. And the worthy lover—be it, Levin or Lucy Morris or Prince Andrei—stands to be wronged if undeservedly cast aside.

I believe that, in real life, the typical wronging resembles this motley assortment at least as often as it resembles a punch in the face. Wrongs are quite frequently unintended and unforeseen. Often they involve harm, but they don't have to. And the wronged party need not have had some right that was violated.

But this is not to say that there is no recognizable pattern. I would suggest that a run-of-the-mill chain of events leading to a wrong looks like this. You do something that you could not justify to someone else. Usually—although not necessarily—this means that you do something that you ought not. Perhaps you say something foolish. Or you forget about something that's important to someone else. Or you are distracted from taking adequate care in some mundane task. As it turns out once things come to pass, someone identifiable could call you to account for what you have done. You have hurt someone's feelings, or caused someone a hassle, or treated someone without proper respect, or violated what someone was

entitled to expect from you. Sometimes the person who can complain could have been identified beforehand, but sometimes someone is affected whom you never would have anticipated. That person's interests may figure in the explanation of why what you did was wrong, but that too is not necessary. What is important is that your action ends up bearing negatively on someone else and you cannot justify your conduct to that person.

I think that we should take this rudimentary description more or less at face value. It seems to correctly pick out situations when one might apologize for one's actions, when one might be forgiven, and when one might reasonably be resented. It also captures the sense that wronging is inescapably *ex post*. And it captures the idea that consequences matter without making them essential.

This description has two parts—first, one's action matters to someone else, and second, one cannot justify the action to that person. In a way, I think that wronging does have these two separate elements. But they are deeply connected. The connection can be illustrated by recasting 'matters to' in terms of the standing to demand justification. One is wronged, I mean to suggest, when one is in a position to demand justification for someone's action and that person cannot give a justification. In this way, both elements concern the demanding and giving of justification. Wrongs arise only where there is someone to whom the action matters because only then is someone in a position to demand justification. Wrongs typically arise when someone acts wrongly because that is usually when there is no justification to be given for such an action. But the unifying idea is that wrongings involve the absence of justification where justification could be demanded.

This line of thought allows the following rough sort of analysis of what the concept of a wrong involves:

X wrongs Y in doing  $\phi$  iff Y can demand justification for X's doing  $\phi$   
and X cannot justify doing  $\phi$  to Y.

More colloquially, one might say that one person wrongs another person when she does something to another person and her doing so cannot be justified to that person. More, however, needs to be said about both elements of this definition.

The requirement that the action matter or concern the other person is, as I have suggested, a requirement that the other person have standing to demand justification.<sup>3</sup> We cannot generally hold each other to account for everything each of us does. If you want to demand justification for an action of mine, you must be able to answer the question “what’s it to you?” Demanding justification can be viewed as lodging a provisional complaint, and one must have grounds for such a provisional complaint. You must have some stake in the matter or I do not need to justify myself to you.

This threshold requirement can be satisfied in a variety of ways. For this reason, I have used intentionally vague descriptions like “it matters to you” or “it concerns you” or “you have a stake in the matter.” The most obvious way that this condition can obtain is when one is harmed. The mother who loses her daughter and

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<sup>3</sup> One might worry that being in a position to demand justification covered more than those who are wronged. A lawyer or a police officer, for example, might be in a position to demand justification without herself being wronged. I don’t think that this poses a problem. These examples involve individuals serving as representatives of others (the client and the state, respectively). In such cases, it is still the wronged party demanding justification, though they do so through an agent.

the Brooklyn Dodgers fan who lost her team are in positions to demand justification because they are harmed. In this way, the harm functions as a sort of moral property. It gets the harmed party past the threshold inquiry of why the action concerns them; it entitles the harmed party to demand justification. But harm does not itself constitute a wrong. In many cases, harm may result to others despite the fact that we act in perfectly acceptable ways. For example, I invent a new product that makes your product obsolete. Or I say something bad about you, but it is both true and something others should know. In such cases, the harm does not give rise to a wrong—*damnum absque injuria*. But the fact that one is harmed means that one can inquire whether that harm can be justified.<sup>4</sup>

Harm, however, is not the only thing that can satisfy the requirement that the person has a stake in the matter. As Ripstein emphasizes, standing also exists when one party harmlessly trespasses on another's rights. If you harmlessly use my bed or kiss me while I'm under anesthesia, I have a stake in that. "You used me" or "you violated my rights" are very intelligible answers to the question "what is it to you?" But, I don't believe that having a right is required, even in the absence of harm. If you harmlessly but unfairly think that I killed Cock Robin, the fact that this thought is *about me* could be enough to generate the sense that I am wronged. It concerns me enough to overcome the "what's it to you" threshold.

In sum, someone is in a position to demand justification only if the action con-

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<sup>4</sup> This doesn't mean that the harm is necessarily separate from the questions about justification. Often the harm will itself be part of all of what makes an action unjustifiable. For example, your making noise may be unjustified precisely because it bothers your neighbor. But sometimes the harm that gives rise to standing does not figure in making the action unjustified. For example, I have suggested that the harm to a victim's mother is not part of the explanation for why negligent driving is impermissible.

cerns or matters to her in some identifiable way, but this standing requirement is broad. It can be satisfied when an action harms someone, when an action violates someone's rights, and even sometimes when an action merely involves someone. The way that the action concerns or matters to the person must, however, be in some way negative. By this, I don't mean that a person can only be wronged by actions that are bad for her.<sup>5</sup> All that there must be is some way that the action bears on her adversely. There must be something that the person could complain of.

Being in a position to demand justification does not require that one actually be able to complain. For one thing, you are wronged when you are murdered, even though your death would prevent you from actually complaining or demanding justification. Furthermore you can have a complaint, even if you do not know it. If the CIA ran experiments on you in your sleep, you would be wronged by that even though you had no idea. When your coworker thinks horrible things about you, you may be wronged without knowing it. So actual ability to demand

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<sup>5</sup> One might think that an action that benefits a person cannot wrong the person. I don't think this is correct. First, if you do something bad for my sake and I benefit from your wrongful act, you may wrong me by making me a participant and a recipient of wrongful gains. Second, it seems possible that to be wronged by an action that nevertheless leaves one overall better off, where the benefit is conferred in an impermissible way. For example, Seana Shiffrin (1999) notes that dropping gold cubes from airplanes might wrong the people below even while benefitting them overall. Third, it even seems conceivable that someone might be wronged by having such a large good conferred on them that they are burdened by the obligations, either of gratitude or noblesse oblige that result.

Still, it does seem like there could be some actions that concern me, but not in any way that I could complain about. If an action only caused me a slight incidental benefit, then I might not be able to overcome the "what's it to you?" threshold. In terms of your standing to complain, it may not be substantively different than if the action didn't affect you at all. But the same might not be true of a similar amount of harm. So the sense in which an action must involve someone does seem to be sensitive to polarity of that involvement.

justification is not essential.

In another sense, however, the ability to complain or demand justification is required. A nonhuman animal is not like the person who simply never knows about a violation. In the latter case, we have no difficulty saying that the person has a complaint but doesn't know it. Were the person aware of certain predicate facts, he or she would be in a position to actually complain. The person *could* complain but for the lack of knowledge. The animal's barrier, in contrast, isn't a lack of knowledge or a lack of continued existence. The problem is that the nonhuman animal is not the sort of thing that can make complaints or demand justification. Rather differently, a wrongdoer might not be in a position to demand justification due to his or her own past actions. In that case, the past actions disable the person from satisfying the threshold question about having a stake in the matter: "Yeah, we lied to you. What's it to you?" Because the demand for justification is also a provisional complaint, being unable to appeal to the relevant norm functions like not having a stake. In sum, the first element of wronging requires that an entity could, in the relevant sense, complain or demand justification.

When someone is in a position to demand justification—because an action harmed her or violated her rights or otherwise concerned her—then that person is wronged if there is no justification that can be given to her. Put another way, the provisional complaint becomes an actual complaint. If you have hurt me, that may entitle me to ask an exploratory, "why did you do that?" This is a provisional complaint insofar as it implies that a wrong might have been done. You may, however, have a very good answer to my query. If you can say something like "I did

it to save your life” or “I was legally required to do that,” then I have probably not been wronged. If your only answer is that you enjoy seeing my pain, then you probably have wronged me. I assume, here, that the former and not the latter are justifications that should be accepted. The idea is that someone is wronged only if the action in question cannot be justified to him or her.

The possibility of justification is what is important; it is not necessary that justification actually be demanded or given. One might think, from what has just been said, that wronging is grounded on a right after all: the right to be given justification. The wrong is the result of a denied claim, namely the claim to justification. But this thought is incorrect. The wronged party is wronged by virtue of there being no justification. One is wronged even before she asks for justification—but she only knows it when the request is given insufficient answer. It is the unjustifiable action that constitutes the wrong. In fact, one might be wronged and never know it—as you were that time the CIA ran experiments on you. It is the fact that an action could not be justified to you that matters.

To say that an action could be justified to you is, roughly, to say that the actor could give reasons to you that you should accept for the action. There is much more that must be said than I can offer here. Still, there are a few points that I would like to highlight.

First, justification is a relational concept. It is justification *to* the other person that matters.<sup>6</sup> In part, this means that whether one can offer justification will de-

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<sup>6</sup> I am agnostic about the extent to which the justification must appeal to the person in question in order to be satisfactory. For example, it is debatable whether saving someone else can count as a justification to someone whose rights are infringed in order to save the person. If it doesn't, then it is possible that, in such cases, one wrongs the person whose rights are infringed



pend on the nature of the relationship between the parties. For example, suppose that Bonnie and Clyde are on a crime spree when Bonnie becomes wracked with her misdeeds and turns herself in. I think there is a sense in which Bonnie wrongs Clyde in doing this even though she may be doing the right thing.<sup>7</sup> Surely there is a good justification for Bonnie's actions, but (and this is the key) there is not a justification that can be offered *to Clyde*. The nature of their relationship is based on the forsaking of certain values so an appeal to such values would carry no weight. It is important to distinguish, here, that the point is about the existing relationship between the parties, and not about what the harmed party would accept as justification. If an innocent bystander turned Clyde in, Clyde might be equally unwilling to accept the justification for that action. But we would not say that this person has wronged Clyde. What matters in the first example is not that Clyde wouldn't accept Bonnie's justification, but that Bonnie's offer of that justification has no traction given their relationship. Bonnie is, so to speak, estopped from offering it.

This relationship-dependence can work in the opposite direction as well. A relationship between two parties can mean that certain reasons will count as justifications that might not otherwise. For example, Bonnie might be able to justify some act to Clyde on the grounds that it will facilitate their robbery. But this relationship-dependence is not limited to justice among thieves. Whenever people share in a set of institutions or social cooperation, that relationship can make

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even though one acts permissibly. On the other hand, if we think that saving the person is a justification to the rightholder, then it will not constitute wronging that person. It strikes me as a virtue of the present account that it remains open to either characterization of cases like these.

<sup>7</sup> This example is borrowed from Christine Korsgaard.

certain reasons count as justifications that, without the background relationship, might not. In particular, we can afford each other certain prerogatives to act on our own interests. For example, in some communities, the mere fact that someone wants a three-car garage might be a justification for casting shade on a neighbor's vegetable garden. In some neighborhoods, however, it might not be. Where it is, the person's desire alone counts as a justification because there is a background agreement that each person will have the prerogative to do that sort of thing with their property should they so desire.

In this way, justification often may not require a great deal. It may simply involve asserting one's own self-regarding reasons for pursuing a certain action. For example, I might justify selecting our town's other ice cream parlor by noting that I like their flavors better. And I might justify my three-car garage by explaining that I need room for my new Jaguar. Or it might simply involve appealing to some shared norm. For example, I might explain that I did something as a matter of etiquette or as a religious duty. The point is that whether one person can offer another person a justification is going to be highly context- and relationship-sensitive.<sup>8</sup>

Both elements of this account of wronging—the requirement that a person be

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<sup>8</sup> One might be tempted to think that if justification can be this minimal, then there really is no requirement for justification at all. But I think this is incorrect. Even where someone has a prerogative to treat self-regarding reasons as decisive, they could act in a way that cannot be justified to another person. Suppose, for example, that I justified adding the garage by saying, "I wanted to block the sunlight from reaching your vegetable garden because I wanted to spite you for beating me in the housing development's tennis tournament last month." In such a case, the neighbor in a way appears to be wronged—he might reasonably resent the addition in a way that wouldn't have been appropriate if it was just normal suburban growth. There seems to be a sense in which one can be wronged even by permissible actions when they are done with bad intent. This can be understood by recognizing that, if one's actual reasons for doing something were bad, one cannot justify one's action by appealing to good reasons without a degree of disingenuousness.

in a position to demand justification and the requirement that justification cannot be given to that person—contain directed, relational elements. In this way, the account of wronging is doubly ‘bipolar.’ It involves a connection between moral agents in two ways. First, the wrongdoer must do something *to the other person*. The parties are connected by the action in question because one person has acted and the other person has been acted upon. Second, the wrongdoer must be unable to offer a justification *to the other person*. This requirement connects the parties as the giver and receiver of reasons, and it invokes the context of their particular relationship to one another. When these connections exist, then a bidirectional moral connection exists: the wrongdoer has committed a wrong *to* the victim, and the victim has a complaint *against* the wrongdoer.

The significance of the two elements can be illustrated by contrasting with cases in which each is absent. We sometimes witness another person acting wrongly, who could not justify his or her behavior to us if called upon to do so. But the action may not concern us. We are neither harmed nor violated nor even concerned in the matter. In such circumstances, we are not wronged. Still, some lesser analog exists. Strawson describes the negative reaction arising in such cases as “moral indignation”—“the vicarious analogue of resentment” (1962, pp.70-71). Moral indignation is like resentment because it arises out of a failure of justification, but is a weaker vicarious analog because it is not one’s own harm for which justification is sought. Another lesser analog of wronging arises when the requirements for standing to demand justification are met and yet there is no one from whom one can demand justification. This happens when one feels a sense of injustice at

misfortune. The victims of a hurricane, for example, may feel something akin to resentment. This response makes some sense: the hurricane has caused them harm for which no justification can be given. Of course, they are not truly wronged. But the victims' relationship to the hurricane shares one element with the relationship between one who has committed a wrong and one who has suffered it.

### 10.3 RIGHTS

RIGHTS HAVE A DIFFERENT CHARACTER THAN WRONGS. In the preceding chapters, a number of features of rights have been tentatively put forward. Having a right involves being owed a directed duty from another. This directedness appears to be connected with certain activities like waiving and claiming. Without powers like waiver, someone who is protected by a duty—like the mother for whose care a promise has been made—may not seem like a rightholder. Without the authority to make a claim, actions that might nevertheless constitute wrongings—like bad thoughts or a lack of gratitude—still do not seem to be things over which we have a right. Furthermore, rights are action-guiding. The presence of a right—unlike the presence of a potential wronging—exerts a special force over the person deciding what to do. This force can involve trumping, or excluding, other considerations. Rights can govern our actions, I argued, even where the rightholder is not in a position to hold us accountable. Rights, in sum, are about shaping our deliberations before we act, and not about accountability afterwards.

I mean to suggest that, whereas wrongs exist *ex post* and are connected to justification, rights function *ex ante* and are connected with respect. The support for

this suggestion should be evident in the features of rights that I have just described. Rights play their important role before an action is performed. When an agent has yet to act, the presence of a right shapes the deliberative process. It does so by giving the rightholder authority or sway over the contemplated action. This authority is evident in certain powers that can be exercised only *ex ante*—the powers of waiving and demanding. Recognizing a right involves recognizing that the rightholder has this special status in one’s deliberation.

In this way, rights are about respect. To have a right is to be the bearer of importance in others’ deliberations; this is what Darwall (2009) refers to as “recognition respect.” Rights are about appreciating the special normative importance of others. They involve obligations to treat another in a certain ways because he or she has some normatively significant property.<sup>9</sup> This thought roughly begins to capture a sense of respect and a sense in which the other is the source of duty.

But not every instance of recognizing another entity as normatively significant constitutes respect. As discussed in Chapter 2, a party may incidentally fall within the scope of another person’s obligation—and thus hold normative significance—without the obligation being owed to them. For example, if you promise me that you will tip your hat to every mustached gentleman that you meet for the rest of the week, then, although mustache bearers acquire a normative significance, recognizing this normative significance wouldn’t count as respect for the mustached. What

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<sup>9</sup> More formally, we might say something like: X has a duty to treat each member of type  $\Psi$  in a certain manner because that member belongs to type  $\Psi$  and Y belongs to type  $\Psi$  and doing  $\phi$  is the appropriate way for X to treat a member of type  $\Psi$ . The point is that the obligation is owed to the other person insofar as it is based on the other person’s normatively significant property. But, as described in what follows, this thought is incomplete.

one needs is the thought that the status in question is a normatively significant category *on its own*.<sup>10</sup> In fact, one might say that it is precisely because someone can matter without being directly significant that wronging can outstrip rights in the ways that I described in Chapter 4. The respect involved in rights is a special kind of normative significance; far narrower than the open-ended normative considerations that can go into questions of justification and wronging.

I mean to suggest that respect involves seeing another as significant on his or her own if the significance is not just instrumental or indirect. The problem with appealing to the category “mustached” is that the category is only important as an instrument to fulfilling your promise. Unlike tipping the hat to mustached gentlemen, which one does as a means to satisfying one’s promise, treating another with the respect he or she is due is not a means to satisfying some further goal. Respect involves recognizing significance of non-instrumental form. But, to borrow a distinction from Korsgaard (1983), non-instrumental doesn’t mean intrinsic significance. Someone may have a status that generates respect and rights in part due to its extrinsic significance. For example, the status of being a speaker may be the basis of rights in part or whole because of the role that protecting speakers plays for the autonomy of listeners or the health of civic discourse.<sup>11</sup> Similarly,

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<sup>10</sup> Put another way, what one is looking for is the major premise in the syllogism leading to the duty, not the minor premise. If someone asks why you felt a duty to tip your hat to the young man who just walked by, there are two response that you might offer: (1) I promised to tip my hat to all mustache bearers, and (2) that man has a mustache. You might offer (2) as an explanation if the inquiring person already knew (1), but if one is inquiring into the source of the duty, (1) would be the appropriate explanation. In fact, in normal conversation, the response “because he had a mustache” would be taken as a joke—giving normative significance to a category that obviously has none. What the skeletal definition seeks is an appeal to a category that explains where the duty comes from.

<sup>11</sup> Just to be clear, the non-instrumental significance here is perfectly compatible with it being

parental rights may be based on the significant status 'parent' even though the reasons for treating parents with deference may have more to do with the importance that according that status has to children. So, in this way, respect involves not simply recognizing another's normative significance, but recognizing the other's non-instrumental normative significance. It is the recognition that the other deserves some treatment on his or her own.

Still, even if this rough description captures a basic idea of respect, not every instance of this kind of respect implicates rights. We might accord a great work of art or a natural wonder its own normative significance. It is quite plausible that, out of respect for such an object, we have duties that are not simply based on the human interests involved. But this respect would not mean that we are according the object in question rights. The respect involved in rights is more particular. Notice, however, that even this kind of respect does seem to capture some form of directness. Although it would be nearly absurd to say that *Hamlet* or the great sequoia groves have rights, it is not unnatural to think that one owes it to *Hamlet* to stage the play in certain ways or to think that it would be wrong to the sequoias to chop them down for toilet paper. So, even here, some link exists between respect and the sense that obligations are directional. Rights, however, seem to involve more than just this.

Rights involve a deeper form of respect. Rights do not imply simply that the case that the value of the right—or the value of that general pattern of treatment—is at least partially extrinsic. For example, when the government avoids silencing a speaker for his or her viewpoint, it does not do so as a means to further some end. If it did, then a speaker could be silenced whenever that end is not being advanced. Respecting a speaker does not just have this instrumental significance—it is pursued for its own sake. This is true even if the reason that such categorical treatment is valuable depends on its benefits to society at large.

rightholder is normatively important—a source of reasons. Rights mean that the rightholder is normatively important in a distinctive way—as authoritative, or as a source of a privileged kind of reason. The respect here is not just that involved in recognizing qualities. It also involves recognizing a decision-maker. Though they deserve our respect in a way that may guide the weight we place on certain considerations and thus the decisions we make about them, *Hamlet* and the sequoias don't take decisions out of our hands. To afford someone a right, in contrast, is to recognize that some matter is not even up to you to decide. It involves respect in the deeper sense of acknowledging authority outside oneself.

This description, however, is still somewhat nebulous. In what follows, I mean to describe two ways to understand this special form of respect—that is, two ways to understand rights in terms of respect. According to the first view, having a right involves being able to make a claim on another person. In this sense, having a right involves being able to exercise authority over another through the activity of making a claim. It involves respect for the rightholder as a giver of reasons. According to the second view, having a right involves having an entitlement, which is understood as a sphere of activity that is specially protected. Respect, in this context, is respect for the other's actions.

These two conceptions of rights and respect have already made prominent appearances in earlier chapters, both as contrasts with wrongs. Consider two of the examples of rights that have been considered. In Chapter 8, I argued that we resist the idea that there are rights concerning each other's mental activity because we cannot make claims on what other people do in their minds. I suggested that, even



though there may be duties owed to one another, there are not rights because the activity of claiming is unavailable. We have no authority over each other's mental life. This invoked a conception of rights as claims that we can make on one another. In contrast, in Chapter 7, I argued that wrongdoers and nonhuman animals can have rights, even if they are not in a position to complain. I suggested that this was the case because there are duties that are owed to them in sense that they are entitled to certain treatment. This idea that they are entitled to certain treatment was evidenced by certain special characteristics of our duties toward them. In particular, the duties have a deontic structure that resists tradeoffs, a phenomenology of being owed to the other and not just to the world at large, and an attached prerogative of others to make sure that we abide by these duties. This invoked a conception of rights as entitlements—as special constraints on how we must be treated by others, i.e., as correlated with special kinds of duties.

It may appear as though these conceptions are in tension with one another; rights must be one or the other. I don't know that this is correct. I think that we use the word "right" ambiguously to refer to both these ideas, and I don't know that anything is gained by privileging one use over the other. In fact, I shall argue that these two conceptions are ultimately dependent on one another. On the one hand, when one makes a claim, one seems to be claiming *something*. The natural thought is that one is claiming what one is entitled. This description makes the activity of claiming seem to depend on the existence of entitlements to be claimed. On the other hand, an entitlement isn't just something that we ought to receive; it must be something that we can claim as rightfully our own. This way of framing

matters makes it look like entitlements depend on the activity of claiming. In my opinion, both of these dependence claims are essentially correct and neither one is privileged.

These two conceptions, I believe, represent two perspectives on the special significance that rights play in our deliberations. In this sense, they are two perspectives on the special respect that rights involve. Respecting a rightholder means recognizing that one does not have authority over that person in some matter. This can be viewed either as recognizing the other person as the authority or as recognizing limitations on one's own authority. For an analogy, recall Hart's suggestion that a rightholder is "a small-scale sovereign," discussed in Chapter 3. A nation might respect its neighbor's sovereignty either by recognizing the other country's authority over its lands or by appropriately recognizing that its own authority does not extend into the other's territory. The respect involved in rights can be understood in both ways as well—either as recognizing the other as an authority or as recognizing that there are boundaries which afford the other a sphere of control. The former involves thinking of rights as claims, and the latter involves thinking of rights as entitlements. And, as I have said, I think that these two conceptions, though different, reinforce one another. In the next two subsections, I will say something more about each.

#### 10.3.1 RIGHTS AS CLAIMS

Thinking of rights as tied to making claims has appeared already in previous chapters. In Chapter 2, I argued that one of the weaknesses of the interest theory is that

it does not seem to capture the connection between having a right and performing certain activities. In Chapter 9, I argued that we resist the idea that there are rights to be thought of in particular ways because thoughts do not seem to be subject to our making claims.

These arguments depend on an active conception of rights—that having a right involves having the ability to *do something* of normative significance. This understanding sees the rightholder as not simply the passive bearer of normative significance but the active source of normative demands. Although other candidate activities have been mentioned, I believe that the distinctive aspect of rights is that they involve one party making a claim on the other party. A rightholder can engage in the activity of claiming. More formally, we might say:

X has a right that Y do  $\varphi$  iff Y has a duty to  $\varphi$  and X can claim that Y perform that duty.

More need to be said about the activity of claiming before this definition can be meaningful. Still, the basic idea is that having a right involves having a special sort of authority over a duty of another person.

The conception of rights as claims is most famously developed by Joel Feinberg (1970). Feinberg emphasizes the performative activity of claiming as a crucial aspect of rights. He distinguishes between “performative claiming,” or “claiming to,” and “propositional claiming,” or “claiming that.” The latter sort of claiming is basically a form of assertion. In this respect, the performative claiming is what is crucial. To make a claim to something is “to petition or seek by virtue of supposed right.” What is crucial is that “making a claim to can itself make things happen.” I

agree that this activity of claiming is a distinctive feature of rights. It is one that has appeared repeatedly in the preceding chapters.

In addition to showing that claiming is a distinctive feature of rights, Feinberg makes a further suggestion. He contends that the activity of claiming is not only distinctive but, in a sense, explanatorily prior. This second element of Feinberg's argument is more or less a rejection of the conception of rights as passive entitlements. In this vein, he writes,

“What is it to *have a claim* and how is this related to rights? I would like to suggest that *having a claim consists in being in a position to claim, that is, to make a claim to or claim that*. If this suggestion is correct it shows that primacy of the verbal over the nominative forms. It links claims to a kind of activity and obviates the temptation to think of claims as things, on the model of coins, pencils, and other material possessions which we can carry in our hip pockets.” (1970, p.253)

This thought—that claims must be understood in terms of an activity—combines with the view that rights are valid claims, to yield the idea that having a right involves being in a position to claim. That is, rights are not entitlements (things we just carry around with us) but rather normative powers to do something, namely make a valid claim. Feinberg seems to saying that the activity of claiming is, in some sense, prior to the thing claimed. There being claims depends, for him, on there being the activity of claiming.

I believe that Feinberg's account is very attractive. It explains a way in which rightholding can be about more than just having certain properties or interests, and instead about having certain authority. As a result, I think that it offers an important characterization of the respect owed to a rightholder. But, despite whole-

heartedly endorsing these aspects of Feinberg's argument, I am not convinced of the explanatory priority. Feinberg seems to think that the activity of claiming is, in some sense, prior to the thing claimed. I am unsure about this. It seems to me that the activity of claiming and having something to claim are mutually dependent, neither having priority over the other.

In order to make his argument Feinberg envisions a world called Nowheresville, which lacks the activity of claiming. Feinberg contends that Nowheresville might be populated by a variety of moral concepts, including wrongness and duty, but that it will lack rights as long as there is no practice of claiming. Feinberg suggests to his reader that a world without rights would be importantly lacking, and that what would be missing is not any set of norms but rather the activity of making claims on one another.

Among the elements that Feinberg says might exist in a world without rights is some notion of personal desert, in the sense it might be "fitting" for people to receive certain treatment. At times Feinberg describes actions based on desert or fittingness as "supererogatory" or "gratuity," but this seems to be a bit of a red herring, making the actions seem optional. If Feinberg admits into Nowheresville the concept of duty and the concept of fittingness, then there should be no reason why the two should not combine. That is, if Feinberg's argument is correct, then there could be duties that are based on desert.

This can start to look like a right, even though we have said nothing about claiming. That is, if there can be duties that are owed because another person deserves certain treatment, it may be start to look like we have all the elements necessary for

rights. Consider an example. One could, in Feinberg's world, say that an innocent person does not deserve to go to prison. There is a duty not to send this person to prison, and it is based on the fact that the person doesn't deserve to go to prison—it's not fitting. Now suppose that the innocent person asserts this principle as a reason for us not to send him to prison. Does he thereby make a claim? That is, does he engage in the activity of claiming by virtue of pointing us to a reason that references the duties that arise out of giving him what is fitting? It may appear that he does. That is, if there is a concept of desert and individuals can draw our attention to the things that they deserve, then that seems to already introduce the practice of claiming.<sup>12</sup>

Although not wrong, this is a bit too hasty. Pointing out that one is deserving of something—that is, pointing out that another is under a duty to do something because it is fitting that you be treated this way—is not exactly the same thing as claiming it. It is true that, when one makes a claim, what one is doing is pointing out that one is entitled to something. But not every instance of the pointing out an entitlement involves making a claim. For example, a guest at a dinner party might laughingly note, "you really ought to serve the guest first," with a tone that makes clear a complete indifference to whether this rule is followed. Or, to use an example that has arisen elsewhere, someone might point out that another per-

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<sup>12</sup> This is much the same criticism that Jan Narveson raised in his commentary on Feinberg's original article. He writes, "I don't see why people who are the proper and deserving beneficiaries of various duties and benevolent sentiments should not be in a position to point this out to those whose duties, etc., they are; and why this does not amount to a claim" (1970, p.258). Narveson's argument seems a bit too broad. He describes the potential claimants as "the proper and deserving beneficiaries of various duties and benevolent sentiments." But not all beneficiaries of a duty are the basis for the duty.

son has reason to show gratitude—"You should remember all that I have done for you"—without exactly making a claim. And, of course, we regularly point out that other people deserve to be treated in some way without thereby making claim for them. So, making a claim seems to involve something more than just pointing out that one ought to be treated a particular way.<sup>13</sup>

The additional element, I think, is an aspect of authority. Making a claim involves not merely drawing attention to a way that one ought to be treated, but doing so in an authoritative fashion. When one makes a claim, one does more than just put something forward for the other person's consideration with their own judgment. It is not just making a suggestion or giving advice. Rather, making a claim implies an authority to tell another person how to act. In this sense, to make a valid claim is to insert oneself into the deliberation of another. It involves giving—not just showing—another a reason.

Feinberg's point, I think, is that the possibility of this special kind of drawing

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<sup>13</sup> One might appeal to the idea of wronging to explain the extra aspect that claiming introduces. At a number of points, Feinberg does appeal to this idea: "If the deserved reward had not been given him he should have had no complaint, since he only deserved the reward, as opposed to having a right to it, or a ground for claiming it as his due." "[W]hile the sovereign was quite capable of harming his subjects, he could commit no wrong against them that they could complain about, since they had no prior claims against his conduct. The only party wronged by the sovereign's mistreatment of his subjects was God, the supreme lawmaker." "I have in mind the familiar phrase in certain widely distributed religious tracts that 'it takes three to marry,' which suggests that marital vows are not made between bride and groom directly but between each spouse and God, so that if one breaks his vow, the other cannot rightly complain of being wronged, since only God could have claimed performance of the marital duties (as his own due; and hence God alone had a claim-right violated by nonperformance." "A direct apology to Billy would be a tacit recognition of Billy's status as *la* right-holder against him, some one he can wrong as well as harm, and someone to whom he is directly accountable for his wrongs." Unsurprisingly, I think this is incorrect. And I think that the gratitude example makes this quite clear. We can wrong someone by failing to show him or her proper gratitude. We might apologize for it afterwards. This is not because the person had a claim in advance in Feinberg's sense.

attention is what makes entitlements into rights. If we could not engage in this kind of authoritative assertion, then the duties that are owed to us would all resemble duties of gratitude—fitting and required, but not claimable. For this reason, he suggests that, in a world without claiming, there could be duties based on what is fitting for others, but there couldn't be rights. Rights cannot exist without the activity of claiming.

This active conception of rights connects with one way of thinking about the special respect implicated by rights. As I have noted, a rightholder is not merely respected as a valuable object in the world, the way that art or natural objects might be respected. Rather, a rightholder is respected as someone who has active authority over others. In the passage quoted earlier, Kant notes that respect is something that a person “exacts for himself” and that “he can demand from every other human being.” The respect involved in rights, in this sense, is a respect that can be asserted or demanded. When someone has a right, others appreciate not merely that they owe something, but that something can be exacted from them. This is the kind of respect that a right entails.

#### 10.3.2 RIGHTS AS ENTITLEMENTS

As much as Feinberg's argument illuminates key connections between rights, respect, and claiming, I am not convinced that claiming is *more* essential to rights than the thing that is claimed. Consider the difference between deserving a prize in a contest in which you are the most qualified entry and deserving your paycheck at the end of the week in accordance with your employment contract. The latter



looks like a right; it can be claimed, in Feinberg's sense, in a way that the former probably cannot. But this fact seems to be explained by a further fact about what is being claimed. We cannot claim the prize in the way that we can claim our paycheck because, even if we do entirely deserve it, the basis for that desert is less firm, less established. The more that we imagine the rules for the contest being concrete, public, and involving no discretionary components, the closer it comes to looking like the winner can make a claim to the prize.

These considerations make it appear as though claiming depends on there being things that we can claim, i.e., things that we not only deserve but things to which we are entitled. In other words, claiming seems to depend on a kind of established, rule-governed desert. Sometimes even Feinberg seems to describe claiming in this way: "he serves notice that he now wants turned over to him that which has already been acknowledged to be his" (1970, p.251). In this light, the activity of claiming seems predicated on there being things to which we are entitled. If we added such entitlements to Nowheresville, then it seems like claiming would follow on their heels.<sup>14</sup> This thought makes it seem like rights aren't about being able to claim *per se*, but about having entitlements, which in turn are the sort of thing that can be

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<sup>14</sup> Feinberg himself seems to admit something like this. He writes, "The propriety involved [in Nowheresville desert] is a much weaker kind than that which derives... from his having qualified for it by satisfying the well-advertised conditions of some public rule. In the latter case he could be said not merely to deserve the good thing but also to have a *right* to it." (1970, p.245). This seems basically correct to me, but I don't see why Feinberg should believe it. In a sovereign rights monopoly, satisfying the conditions of a public rule should be like deliberately becoming the incidental beneficiary of someone else's promise. One ought to receive something, but it isn't owed to you. Feinberg's point may be that this conception of entitlement is unstable. If it is "well-advertised" that a certain benefit will be conferred, then the recipients will come to regard it as a right based on their legitimate expectations. But this would seem to undermine the entire idea of a sovereign monopoly of rights.

claimed. To the extent that Feinberg's argument is that the activity of claiming is conceptually prior to what is claimed, it's not clear that he is correct.

According to this line of thought, claiming itself depends on our already having a right, understood in terms of something that it is not just fitting or obligatory for us to receive but something to which we are entitled. This suggests that the focus should be on what is owed. Rights involve a special connection between a person (the rightholder) and an obligation. Claiming focuses on the person and, I believe, for good reason. But one might focus instead on the obligation. That is, one might focus on what sorts of obligations involve rights. In this section, I want to consider this way of thinking about rights and respect—not as the claim, but as the thing being claimed, which is to say, as the obligation in the other person.

As already noted, not all obligations of respect give rise to rights. We can recognize a piece of art or a natural wonder as having its own non-instrumental normative significance without thereby according it rights. The question is what is special about rights. One possibility is that rights can be claimed. But might there be another possibility in terms of the obligation itself?

One temptation here is to appeal to interests. Obligations of respect for a normatively significant status constitute rights, one might think, only when the obligations or the status advance the interests of the other entity. Artwork and mountains, even if deserving of respect, cannot be rightholders because they have no interests. And it may seem that, even for humans, something is only a right if it's good for us. If a normative constraint did not on balance advance the interests of the subject, then, according to many writers, it would not be a right. For exam-

ple, if the law requires you to enslave me, we would not say that this gives me a legal right to be enslaved (Cruft, 2004, p.364). Without a rider that a right must serve its holder's interests, then one might have rights in virtue of being entitled to certain treatment as, say, "undesirable."

Despite the intuitive appeal of such examples, I don't believe that rights must advance their holders' interests. In Chapter 2, I discussed cases in which a person seems to have a right that does not serve his or her interests at all—for example, the farmer who has a right to use a particular fertilizer even though she is completely indifferent to it. Beyond cases of complete indifference, there are plausibly examples of rights that are adverse to our interests. Sophie was granted the right to choose which of her children would live, although it does not seem that this advanced her interests. Somewhat differently, various thinkers have, for example, posited a right to be punished.<sup>15</sup> It seems to me that that this thought should not be taken to be either a category mistake or a claim that punishment advances the interests of the punished. In a similar vein, one might say, for example, "I have a right to be humiliated."<sup>16</sup> All of these examples indicate that advancing an interest is not a necessary feature of rights.<sup>17</sup>

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<sup>15</sup> See, e.g., Dubber (1998); Morris (1976).

<sup>16</sup> W.E.B. DuBois once published a newspaper column entitled "The White Folk Have a Right to be Ashamed," *National Guardian*, Feb. 7, 1949. This locution has the elegant feature of being both deeply critical and yet also implicitly respectful.

<sup>17</sup> I think that these examples actually lend further strength to the idea that having a right involves having a status that generates duties in others. Although neither punishment nor humiliation advance the interests of the subject, they presuppose that the subject has a certain status. It is appropriate to punish someone insofar as the person is someone who can be responsible for his or her actions. To say that someone should not be punished in spite of his actions is to deny that person status as a responsible agent. In this sense, it is demeaning. But this is not to say that punishment serves the interests of the person. So although the actual duty generated is not valuable to the person, the status on which it is based is valuable. Similarly, being humiliated

It may still be the case that, in order to count as a rightholder, one must have interests. Such a constraint makes sense because claiming and acting only make sense if something has interests. Without interests, making claims or performing actions would be pointless. But I don't think that every right must advance an interest of the rightholder.

Instead, I want to suggest that the crucial quality that right-creating obligations have is that they protect the action of the rightholder from interference. Rightholders, unlike artwork or mountains, are animate—they are capable of acting. Obligations regarding them can count as rights because they can protect their actions from the interference of others. Rights carve out spheres of activity. This is a different perspective on Hart's idea of "a small-scale sovereign." The point here is less about authority and more about boundaries. Rights establish the public boundaries where my actions cannot interfere with your actions and vice versa.

According to this idea, rights, when thought of as entitlements, are spheres of protected activity. When we make a claim, what we are claiming is a protection—not just any protection but the kind of protection that demarcates when one person's action may not interfere with another person's action. Rights as entitlements,

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does not advance one's interests. But it does imply that one has a sort of dignity or standing that is threatened. Although being humiliated is not in one's interests, it would be, in a sense, worse to have the status of being unable to be humiliated. This is why it makes sense to say that one has a right to be humiliated. In this way, these examples differ from Cruft's duty to enslave because in that example we assume that it is an undesirable status on which the duty is based. One can, however, reimagine the example in such a way that it no longer seems mistaken to think of a right to be enslaved. Suppose, for example, that society had a culture of dueling, in which it was the duty of the winning party to enslave a worthy opponent but let free an unworthy loser. It seems to me that one might, in such context, speak of someone having a right to be enslaved, even though the person's interests would be better served by being let free. Enslaving would, in such a case, be a way of showing the other person respect, although undermining his interests.

in this sense, are connected with a special kind of respect. We can respect artwork or a mountain as having normative significance. But the respect for a rightholder is the recognition of another with whom we share the realm of activity. This respect distinguishes a special form of obligation. Above, I noted that, although one might deserve a prize, we would not naturally think of that as a right. This, it can now be said, is because the respect for a prizewinner is more akin to the respect for a great piece of art. Both may be obligatory recognition of a significant status, but they are not about the shared rules by which we carve up the realm of action. In this way, neither constitute rights in the entitlement sense.

From this perspective, we can quite easily understand the thought that nonhuman animals and disabled humans can have rights, even where they might not be capable of making claims. Nonhuman animals and disabled humans are animate. They do things, and our activity can interfere with their doing things. We can, in this sense, *interact* with them. As a result, respect for them isn't simply the respect that we might owe a great painting—appreciation and preservation of a locus of value. It is, instead, the respect for something that has a sphere within which it is entitled to act without interference. It is the respect that goes along with appreciating that another can do as it pleases.

When we engage in the activity of claiming, it seems like there must be some entitlement like this that we are claiming. In this way, claiming seems to depend of the thing claimed. But entitlements also seem to depend on claiming. Why, after all, do norms that demarcate spheres of activity have a special character? Such norms are special, one might think, precisely because they mean that the other

actor's choices become an authority for us. Put this way, it can look like activity is important because it implicates claiming. Rights arise because we interact with one another. This interaction is governed by norms, which, insofar as they apply to what happens between us, are shared. They aren't just norms connecting our action with abstract value; they are norms that connect our action with other people's actions and decisions. Entitlements are distinctive, we might think, because they are the sort of thing that could be claimed.<sup>18</sup>

Thus, I think that these ideas—rights as claims and rights as entitlements to protected spheres of activity—depend on one another. Entitlements give claims their content; claiming depends on there being something to claim. But entitlements, the things that we can claim, are distinctive because they represent the sort of thing that could be claimed; they are protections of our sovereign authority. We often operate with one or the other conception of rights, but they seem to be importantly connected.

In particular, both ideas describe perspectives on the thought that rights are about the duties that we owe to other agents out of respect for them. Rights are about recognizing the normative significance of another. This recognition can be of the other as an authority who makes demands or as another actor whose sphere of activity limits one's own. Either way, the rights of others serve their function in

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<sup>18</sup> It should be clear that the 'could' here is not describing a physical capacity. I might not be able to claim the jackpot because I am unaware of that my ticket is a winner. But this factual barrier doesn't mean that I don't have a right to the jackpot. That right is based on the fact that I *could* claim it, in some sense. The actual ability to make a claim is not essential. In this vein, it is noteworthy that, in another possible world, nonhuman animals and disabled humans could claim the treatment that they deserve. But we would have to reach a much more distant possible world before inanimate objects like artwork or mountains made claims.

shaping our deliberations *ex ante*. In this way, both conceptions offer a clear contrast with the retrospective and more general questions of justification that are at the core of wrongs.

#### 10.4 SIMILARITIES

AT THIS POINT, I HAVE DESCRIBED A VARIETY of differences between wrongs and rights. I have argued that rights and wronging are two distinct relationships in which parties may stand. They are not flipsides of the same coin. And I have tried to offer independent characterizations of each relationship. Having emphasized the differences, it is worth pausing to discuss certain aspects that wrongs and rights share and certain ways in which they may be analogous.

##### 10.4.1 ACTIVE, PASSIVE, AND PLACEHOLDER CONCEPTIONS

I have focused on distinguishing two different moral phenomena. But the careful reader will notice that I have, at various points, acknowledged that we sometimes operate with various different conceptions of rights and wrongs. For example, I just described two different conceptions of rights with which we sometimes operate. Elsewhere, I have acknowledge that we might operate with what I have called a “placeholder” conception of wronging, which dodges the differences between rights and wrongs by stipulation. The fact that we can shift among these different conceptions can obscure our thinking about the underlying moral phenomena. In this section, I want to say something about these different conceptions of rights and wrongs and about how I see them relating to one another.

Let me begin with the placeholder conceptions. We can, I have acknowledged, simply stipulate that “wronging” implies the violation of a right. It is probable that the word is sometimes used in this way. If this is our meaning, then we can say that the mother in Hart’s example is not wronged, precisely because she has not had her any right violated. Here, “wronged” is used simply as a placeholder for the violation of a right. On the other hand, we might also sometimes use the word “right” to mean that the person stands to be wronged. In this way, we can say that the mother has a right that her child not be killed precisely because she stands to be wronged if her child is killed. I think that we sometimes speak and think in this way as well. When we do, we are using the idea of a “right” as simply a placeholder for a potential wronging.

These placeholder conceptions are not, I have suggested, terribly useful. For one thing, we could not have only placeholder conceptions, as that would be entirely empty. We must have a substantive conception of one relationship in order to have a placeholder conception of the other. Insofar as we do have substantive conceptions, the placeholder conceptions mask the fact that there are distinct moral phenomena that count as rights and wronging. We have commitments about what rights are and about what wrongs are. There are features of our moral experience that we think of as rights and that we think of as wrongs. It is these substantive conceptions that I am focused on. I have argued that, understood in these ways, rights and wrongs are distinct phenomena.

Even limiting ourselves to the substantive conceptions, there may be different conceptions of rights and wrongs. In the previous section, I described two differ-



ent conceptions of rights. Both conceptions, I argued, can be considered ways of filling in the sense in which rights involve respect for the rightholder. One conception was active—rights involve the activity of making claims. According to this conception, rights involve norms that the protected party can assert in a special way. The other conception was more passive—rights involve having morally significant qualities of a certain sort. Rights, in this sense, exist where the norms protecting something have a special character and wall off a sphere of protected activity.

Although I emphasized that these two conceptions are mutually dependent, they can potentially come apart. This happens where there are passive rights without their active correlate. The rights of nonhuman animals and humans with cognitive disabilities are examples insofar as their bearers lack the capacities to engaging in claiming. But other examples can include rights of ordinary human agents, where some barrier exist to the activity of claiming. For example, as the beneficiary of a blind trust, there may be certain things to which I am entitled—things that we would think of as my rights—even though it would be quite odd to think that I have any claims. There is no reason to think that rights of this sort, where only the passive conception is apt, are weaker or less significant. They play much the same role in our moral decisions; they matter to our deliberations in much the same way. It is simply that one conception of rights applies and yet our more active conception does not.

Having described this category of rights in which a passive conception applies but an active conception does not, one might wonder why a parallel point might

	ACTIVE	PASSIVE	PLACEHOLDER
RIGHTS	claims	entitlements	<i>potential to be wronged</i>
WRONGS	complaints	<i>mistreatments</i>	<i>rights violations</i>

**Table 10.2:** Active and passive conceptions

be made about wrongs. Might there be active and passive conceptions of wrong? In analyzing wronging, I linked it with the activity of making a complaint. I argued that breached duties do not generate wrongs where the standing to make a complaint is unavailable—including the case of nonhuman animals. But why not say that there is a passive conception of wronging, analogous to the passive conception of rights, according to which nonhuman animals are wronged? Although they might not be able to complain, animals can be harmed by unjustifiable treatment.

In a way, I see no reason to resist this suggestion completely. We can form a passive conception of wronging with this character. In this sense, the nonhuman animal or the criminal is wronged. We might think of this as a conception of wrongs as mistreatment, distinguishable from the conception of wrongs as complaints. I see no reason to dispute that such a conception is available to us. We might represent these various different conceptions in table form (10.2).

The admission that we might have a conception of wrongs as mistreatment, according to which nonhuman animals can be wronged, may seem to be in tension with what I have claimed elsewhere. It might be if this conception is just as important to us. But I suspect that it is not. I emphasized the active conception of wronging—wrong-as-complaints—because I believe that this conception is the

one that captures wronging's function in our moral experience. When we say "X wronged Y," I think that this is what we ordinarily mean. This is conception of wronging that we ordinarily use, I believe, because it captures our settled commitments about wronging—commitments about accountability, reactive attitudes, remedial obligations, practices of apology and forgiveness, and so forth. In short, complaints are the important phenomena in our moral lives.

Mistreatment, in contrast, is more like a placeholder. It offers an intelligible conception of wronging, and one that picks out certain circumstances. But it is not one, I think, that plays a major role in our moral lives. What matters to us—what shapes how we relate to one another—is wronging understood in terms of complaints.

My central argument is about the connection, or lack thereof, between our fundamental moral phenomena. The arguments that I have offered have sought to show that what matters to us about rights does not always line up with what matters to us about wronging. As a result, I have tried to show that wrongs, understood in terms of complaints, are importantly distinguishable from rights, understood either as claims or as entitlements. We have clusters of moral practices and experience, which, if I am correct, do not always map onto one another.

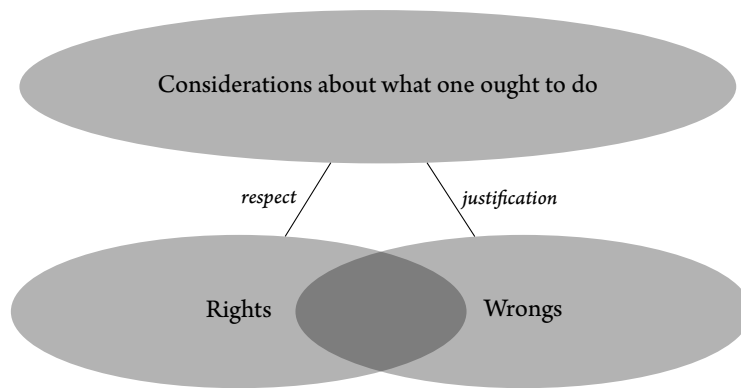
#### 10.4.2 THE OVERLAP

Even if one accepts the arguments that I have made that wrongs and rights are distinct phenomena, one might still wonder whether there is not some underlying connection. After all, there seems to be a large amount of overlap between them.

At the beginning of this chapter, I offered a venn diagram of some of the cases that had been considered. This diagram showed a substantial region of overlap, which contained standard examples of rights and wronging. This overlap reflects the fact that rights violations typically count as wrongs and many wrongs result from the violation of a right. Surely this is not a coincidence. Even if rights and wronging do come apart in the ways that I have described, there must be an explanation for why they so frequently come together.

I believe that the above sketches of wrongs and rights offer an explanation for this overlap. Wrongs, I suggested, arise where an action cannot be justified to someone who has a stake in that action. Rights, in contrast, arise where respect for another person generates a special kind of norm regarding how that person ought to be treated. Considerations about what one ought to do figure in both stories, albeit differently. For wrongs, such considerations matter to the question of whether an action could be justified to the other person. Rights, in contrast, involve a special subset of considerations about what we ought to do.

Because normative considerations play a role in both stories, they can explain why wrongs and rights so often come alongside one another. The same considerations that generate a right will often also be the crucial element in whether an action is justifiable. For example, if you ought not physically assault another human being, then this principle will be relevant both to why I have a right that you not physically assault me and also to why your act of physically assaulting me cannot be justified to me. Put simply, a common way that you can act unjustifiably in a matter concerning me is by violating my rights.



**Figure 10.2:** Overlap

I have argued that this is not the only way. I might wrong you by failing to do what I ought, and thereby being unable to offer you justification for the harm that you suffer, even though the obligation that I violate is not owed to you. In such a case, the considerations that make my action unjustified are not the kind of considerations that ground rights. But in many cases, the same considerations will play both functions. As a result, the reason why something cannot be justified will often be because it violated someone's rights. So, although rights and wronging are distinct phenomena, they have ingredients that are frequently shared.

I don't want to put too much weight on the diagram (Figure 10.2). Its purpose is to illustrate how the same elements can play a role in both rights and wrongs. But there are important elements of my account that this diagram leaves out. First, the considerations that give rise to rights are, I have suggested, only a subset of the considerations that may bear on questions of justification and wronging. For example, the fact that you promised to care for my mother may not give rise to a right

in her, and yet it may still explain why a failure cannot be justified to her. So the diagram should not be taken to imply that the same considerations always give rise to both rights and wrongings. Second, the diagram leaves out important features of rights and wrongs. For example, I argued that wrongs involve not merely a failure of justification but also a standing to demand justification. A more complete picture would include additional elements like this, at the expense of simplicity.

The basic point here is that rights and wrongs share an essential element. They both relate to questions about how one ought to act, albeit in different ways. This should hardly be surprising. It is what makes them both aspects of our ethical experience. But this common element should not, I have argued, lead us to think that these two phenomena are necessarily reflections of one another. Rather, they each play importantly different roles in our ethical lives.

*The surface of the earth is soft and impressible by the feet of men; and so with the paths which the mind travels.*

Henry David Thoreau

# 11

## Conclusion

DISTINGUISHING MORAL RELATIONS AS EX POST AND EX ANTE may seem rather abstract. For this reason, I want to conclude by sketching the practical significance of the distinction. Although how we categorize moral phenomena can appear purely academic, this appearance could not be further from the truth. Rights and wrongs represent ways that we relate to one another in our everyday lives. They

are bound up with a wealth of practices and understandings. When it is appropriate to deploy these practices and understandings is a matter of great practical importance.

I argued that, by separating rights and wronging, we can accommodate two competing pulls, found in both our theories and our rich practical commitments concerning rights and wrongings. With the will theory, we can understand rights as concerned with an ability to exert normative control over someone else's conduct. The duties that correlate with rights are owed to the rightholder insofar as they involve giving the rightholder a kind of authority. In this way, we can say that interpersonal morality is about respecting each person as a maker of claims. This meshes, I think, with how we generally apply the concept. For example, we think that the promisee and not the affected third party counts as the rightholder.

On the other hand, with the interest theory, we can say that we are wronged when someone violates a norm that would have protected our interests. In this way, interpersonal morality involves the idea that we owe it those affected by our actions to ensure that we treat them in ways that can be justified to them. This meshes, I think, with our understanding of wronging. For example, we think that a third party who is injured by a wrongfully breached promise may have a grievance and is not mere bystander.

What is at stake here is hardly just a matter of labeling. It involves questions of who can waive or demand performance, complain or forgive, seek compensation, and so on. And it also involves questions about the source and stringency of the obligation and the costs and ramifications of its violation. In seeking to an-



swer practical questions like these—which arise in legal, political, and everyday contexts—people routinely draw inferences between rights and wrongs as a matter of conceptual entailment. If my argument is correct, then these inferences are often misguided.

On the one hand, a familiar form of argument infers that a party cannot be wronged if that party did not hold a right initially. In law, for example, a tortfeasor may escape liability by arguing that the injured party was not the holder of the right that was violated. This argument is available because of the framework articulated by Cardozo in *Palsgraf*, which essentially relies on the necessary connection of wrongs with rights violations. Consider a typical example of how this plays out.<sup>1</sup> A physical therapist allegedly used highly atypical treatment methods that negligently implanted false memories of sexual abuse in the patient's mind. The patient's father, against whom these allegations of abuse were made, attempted to sue the physical therapist. The court held that, because the physical therapist did not owe a duty to the father, who was merely a third party, the father could not bring a complaint. Having a right is viewed as prerequisite to having standing to complaint. This sort of requirement exists in other parts of the law as well. For example, the government may avoid a defendant's complaint that evidence was unconstitutionally obtained if the search did not violate the right of the defendant, even if it did violate the rights of others.<sup>2</sup> If the argument of this dissertation is correct, then these limitations on legal complaints cannot be justified—as they often currently are—in terms of the essential structure of rights.

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<sup>1</sup> *Flanders v. Cooper*, 706 A.2d 589 (Me. 1998).

<sup>2</sup> *Alderman v. United States*, 394 U.S. 165, 169 n.2, 174 (1969).

The same mistaken inference occurs outside the law as well. In political discourse, it is sometimes argued that a disadvantaged group can have no complaint against a given social arrangement on the grounds that the group has no right to assistance.<sup>3</sup> Even in personal interactions, one might think that someone can have no complaint at being spurned because he or she had no right to affections or friendship.<sup>4</sup> If my contention is correct, then all of these inferences are invalid. Lacking a right does not preclude the possibility that one has been wronged.

The opposite inference—from wrongs to rights—is equally mistaken. There is a temptation to think that every wrong can be traced to a rights violation. Those concerned with injustice may therefore be inclined to posit rights. The law, for example, posits a “right to consortium,” which is essentially a legal fiction conjured up for the sake of acknowledging certain wrongs.<sup>5</sup> And there is a temptation to say that parents, when faced with the injury or death of their child, have a right not

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<sup>3</sup> To pick on someone, consider Jon Elster’s argument in “Is There (or Should There Be) a Right to Work?” (1988). Elster argues that there is no right to work, and implicitly that the unemployed do not have a claim against society on the basis of their unemployment. But it seems to me that, with regard to those who are unemployed, the important question is not whether they have a right to work but whether they can complain against society for their situation. It may be correct that individuals do not have a right to work, but it does not follow that we do not wrong those who society leaves unemployed. It may be—indeed, I suspect it is—the agenda of those who favor a right to work to suggest the sense in which society fails to do right by those who are left unemployed. It seems to me that Elster’s argument does little to address this question.

<sup>4</sup> A common response to a perceived wrong is to say or think, “I didn’t owe you anything.” I believe that this retort is based on a mistake, shifting the issue to a different question. This is why it feels cruel. It is the same inferences seen from the other side that bothers Levin in *Anna Karenina*: “I have nothing and no one to complain about... What right did I have to think she would want to join her life with mine?”

<sup>5</sup> Somewhat similarly, the law introduces the fiction of “transferred intent” in order to explain how malicious intent towards one person can produce a wrong to someone else. For example, if I attempt to punch you but hit the guy sitting next to you, the law treats it as though I intentionally punched the guy sitting next to you. It is as though, in order to be wronged, a person must have been the one whose rights were not properly respected, so we simply pretend that that is what happened.

to have their children harmed. Similar positing of rights runs amok in political discourse. The serious injustices in the world lead to a proliferation of rights talk. But not every wrong—serious though it may be—is founded upon a right that has been violated. The proliferation of rights comes at the expense of confusing what obligations we really have and to whom we really owe these obligations.<sup>6</sup>

We are better off, I believe, recognizing that our *ex ante* and *ex post* moral connections with one another are not simply different perspectives on the same underlying moral relation. Being wronged and having a right are not opposite sides of the same coin. Instead, they represent two different ways in which persons can relate to each other morally. The contrary assumption that they are necessarily connected is a source of not only theoretical confusion but also practical error.

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<sup>6</sup> For discussions of how this rights talk has grown and distorted various issues, see Glendon (1991) and Bedi (2009).

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